(1) Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

GERALD GILLESPIE,

Petitioner,

v.

CITY OF INDIANAPOLIS, and
UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Tenth Amendment incorporate the Second Amendment and Militia Clauses of the Federal Constitution and bar explicit federal control of a State officer's entitlement to deliver, receive, and possess public interest firearms pursuant to State law and in the discharge of State duties?

II. Is application of the federal Gun Control Act to State officers discharging state duties wholly intrastate a constitutional exercise of Congress's Commerce Clause powers?

PETITIONER'S CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual citizen with no stock, no parent company and no holding company.

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OPINIONS BELOW

On July 9, 1999 a panel of the United States Court of Appeals for the Seventh Circuit affirmed the trial court by reported opinion reproduced in the appendix at *A/1-36*. The Federal District Court for the Southern District of Indiana granted summary judgment against FOP on December 9, 1998. The reported memorandum opinion is reproduced in the Appendix at *A/37-77*.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered its judgment on July 9, 1999. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

APPLICABLE LEGAL PROVISIONS

The applicable legal provisions are set forth in a separate appendix.

STATEMENT OF THE CASE

The Gun Control Act of 1968, Pub. L. No. 90-618, §.102, 82 Stat. 1216, was amended in September 1996 to create the first federal firearm possession ban for prior misdemeanor misconduct. The amendments make it illegal for any person "convicted in any court of a misdemeanor crime of domestic violence" to ship, receive or possess firearms or ammunition that affect interstate commerce. *See* 18 U.S.C. §922(g)(9) (Supp. III 1997). The

1996 amendments imposed the misdemeanor possession ban on state officers whose state duties require possession and transfer of firearms while leaving intact an exemption for state officers, including felons, from all other possession disabilities. *See* 18 U.S.C. §925(a)(1) (Supp. III 1997).

The 1996 amendments also imposed criminal penalties upon Chief Law Enforcement Officers ("CLEOs") that provide firearms to state law enforcement officers subject to the new disability under §922(g)(9). *See* 18 U.S.C. §922(d)(9) (1997 Supp. III). The Gun Control Act was further amended by addition of the elements of the predicate misdemeanor crime of domestic violence. *See* 18 U.S.C. §921(a)(33)(A) and (B) (Supp. III 1997).

On November 26, 1996 the Bureau of Alcohol, Tobacco and Firearms, ("ATF") issued an "open letter" addressed to "All State and Local Law Enforcement Officials," *A/84-89,* stating the 1996 amendments criminalize delivery or transfer of firearms by non-federal "government agencies" to disabled misdemeanants, *A/84,* and state officers "performing their official duties" are subject to the criminal penalties. *A/86* The letter noted a CLEO's obligation to "determine" who among the employee officers was affected and to take "appropriate action". *A/84* According to the ATF, appropriate action means affected officers "must immediately dispose of all firearms and ammunition in their possession." *A/84* Based on the ATF information, the Indianapolis Police Department proposed to terminate Petitioner, a career officer with "more than 25 years" employment. *A/2; A/5; A/39* (trial court finding Gillespie's termination based "on Lautenberg amendment.")

Officer Gillespie filed a complaint for declaratory and injunctive relief against the City of Indianapolis, his employer, in the U.S. District Court for the Southern District of Indiana. *A/39* The complaint contained *inter alia* a "facial constitutional attack" on the 1996 amendments. *A/49* The complaint alleged the amendments violated the Tenth Amendment by trenching on the states' authority to establish qualifications for its firearm carrying officers under the explicit terms of the Militia Clause, and the Second Amendment, and, to determine its own approach to domestic relations, including the fixing of civil or criminal liabilities. *A/6* (general statement of issues by court); *A/39; A/49; A/51* (Tenth Amendment issue statement).

Specifically, Officer Gillespie argued that the Second Amendment establishes a fundamental right, in both a collective or militia-related sense and as a personal entitlement, to be free of federal interference while possessing his service firearm in the public interest for his employment. *See A/69-70; A/7* (court rejecting claim to both collective and personal right under Second Amendment); *A/33*. Gillespie also argued his public interest firearm possession was protected by Art. 1, Sec. 32 of the Indiana Constitution and his status as a sworn law enforcement officer obligated him to be part of the Indiana militia, when called upon by the governor. *See A/70* Gillespie finally argued that non-federal public interest firearm delivery, transfer and possession are not commercial transactions within the reach of Congress' commerce clause power. *A/5* The federal government intervened to defend the constitutionality of the statute. *A/39*

On June 5, 1998 the District Court granted the City and federal government's request for dismissal. *A/77* The trial court found Officer Gillespie had standing because the City conceded Gillespie was subject to termination solely "based on application of the Lautenberg Amendment," *A/39*, and not through any exercise of "independent discretion." *A/48* The termination was "traceable" to the federal government because "state and local police departments have no discretion to disregard a federal criminal statute" and no authority to "ignore federal law in hiring police officers". *A/47; see also* 18 U.S.C. §922(d)(9) (1997 Supp. III)

The District Court rejected Gillespie's federalism contentions concluding the domestic violence offense created by Congress, and unknown under Indiana law, did not constitute "compelled state legislation" in the area of domestic relations, *A/52*, that the application to those that carry public interest firearms did not impinge on the State's entitlement to establish public interest firearm possession qualifications, *see A/52* and that the amendments only regulated the behavior of "private individuals" without interference with state sovereignty and the amendments imposed no "federal mandates for states to assist in regulation and enforcement." *A/55* Although the court found Gillespie could no longer possess his public interest firearm, which he possessed pursuant to Indiana state law, the court concluded Gillespie was being regulated as a private citizen and not as a "state official." *A/55*

Finally, the court rejected the contention that 18 U.S.C. §925(a)(1) (Supp. III 1997) as enacted in 1968 was necessary for the Gun Control Act to pass constitutional muster and its 1996 amendment did not deprive the

People or the States as sovereigns of any Second Amendment, Militia Clause or Tenth Amendment entitlements. *A/55* The court declined to reach the issue of whether "the right safeguarded by the Second Amendment is individual or collective in nature" *A/71* holding that under "the most generous construction to the Second Amendment, Gillespie's claim fails." *A/71* The City and the federal government conceded the Second Amendment guarantees a "collective right" to the several states to possess firearms. *A/71* Despite agreeing that Gillespie, in his capacity as a sworn, and trained law enforcement officer is subject under certain circumstances to the Indiana governor's call to serve in the state's militia (more commonly referred to as the Indiana National Guard). *A/70; A/2* citing Ind. Const. art. 5, §12, art. 12, §1; Ind. Code §§10-2-3-1, 10-2-3-2, 36-8-3-15, his public interest possession was held to not be militia related. *A/70* The District Court explicitly rejected Gillespie's *facial* challenge under the Commerce Clause because §922(g)(9) contains a "jurisdictional requirement" that a subject firearm be proven to be "in or affecting commerce." *A/57-8*

Officer Gillespie appealed to the U.S. Court of Appeals for the Seventh Circuit, arguing that the delivery, transfer and possession of firearms by state officers executing state duties is not a commercial event subject to Congress' commerce clause power, and that the Second Amendment and Militia clauses stake out inviolable areas of state sovereignty upon which Congress may not trench pursuant to the Tenth Amendment. Petitioner also argued the Second Amendment compelled strict scrutiny of the statute's impact on Officer Gillespie both as a state actor and as a private individual.

On July 9, 1999 a panel affirmed the District Court concluding the Tenth Amendment "is essentially a tautology" and is not violated if "the [challenged] provision reflects an appropriate exercise of the commerce power." *A/17-18* Relying exclusively on cases involving private firearms, *A/19,* the panel concluded Congress possesses plenary authority over all firearms, including those issued by states and local governments, provided the firearm "moved across state lines at least once" *A/22,* thereby establishing a minimal but requisite tie to interstate commerce, *A/20,* and determined the fact that Gillespie carries a firearm "for official purposes is irrelevant." *A/22; compare* Ind. Const. Art. 1, Sec. 32. The panel concluded Gillespie's Second Amendment challenge failed because Gillespie did not adduce sufficient facts to meet the standard in *United States v. Miller,* 307 U.S. 174, 178 (1939) that the subject firearm bore "some reasonable relationship" to the "preservation or efficiency" of the Indiana militia.[1] *A/35* The panel concluded Gillespie's claim failed to demonstrate that by explicit federal control over his public interest firearm "the

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[1] Gillespie demonstrated as a matter of law that his public interest firearm was militia related by citation to Indiana statutes and provisions of the Indiana Constitution that identified a specific militia-related obligation as a sworn law enforcement officer subject to the Governor's call. *See A/2* (court citing Indiana laws); *see also* Ind. Const. Art. 1, Sec. 32. The panel's conclusion to the contrary appears to arise from an impermissible assumption of facts contrary to those alleged in the complaint. *See A/35* (panel assuming the loss to the Governor and the People of Gillespie's training and skill with a firearm is insufficient to meet the standard set in *United States v. Miller); see also* Fed.R.Civ.P. 12.

viability and efficacy of state militias will be undermined". *A/35*

ARGUMENT FOR ALLOWING THE WRIT

Since 1968 Congress has explicitly recognized that the prohibitions on firearm receipt, delivery and possession appearing in the Gun Control Act may not be applied to firearms issued for the use of "any State or any department, agency, or political subdivision thereof." *See* 18 U.S.C. §925(a)(1). In September 1996 Congress conferred on itself the power to control the decision of which citizens shall be eligible to carry a firearm in the public interest in the several states and to set the qualifications of state militia members and law enforcement officers. 18 U.S.C. §925(a)(1) (Supp. III 1997).

The challenged amendments burst asunder the existing, delicate federal-state balance regarding arming citizens in the public interest that has existed since the adoption of the Militia Clause, and the Second Amendment and the Tenth Amendment. This dramatic departure from historical practice, based upon nothing more than a floor speech of the amendment's sponsor that spoke nothing of commerce or federalism concerns, *see* 142 Cong. Rec. S10377-S10378 (September 12, 1996) (Sen. Lautenberg), was a last-minute amendment to a defense appropriations act.[2] *Id.* If allowed to stand, such a broad

[2] Most of the legislative history cited throughout the government's briefs and the District Court opinion arises from a different piece of legislation that did not make it out of the

federal power becomes indistinguishable from the states' police powers and foreshadows a complete authority to disrupt the Indiana Governor's executive unity that is necessary to enforce Indiana's laws, enforce the judicial decrees of Indiana's courts, and to address emergencies. *See* Ind. Const. art. 5, §12, art. 12, §1; Ind. Code §§10-2-3-1, 10-2-3-2, 36-8-3-15; *see e.g.* Colorado Const. Art. IV, Sec. 5.

Whether expressed as an intrusion upon the State's prerogative to establish officer qualifications under *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) or an intrusion into inviolable areas of state sovereignty carved out by the Second Amendment and Militia clauses, a serious federalism question exists that cannot be brushed aside by citation to cases authorizing federal control over privately trafficked and possessed firearms. The question Gillespie presented to the panel is whether Congress has the power to interfere with the People's right to arm its citizens with public interest weapons, not whether Congress has the power to regulate purely private firearm transactions and possession.

In light of the importance of the federalism and Gun Control Act questions presented, the sheer number of agencies and officers affected, and the departure from

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House of Representatives. *See A/72; compare United States v. Estate of Romani*, 523 U.S. 517, 118 S.Ct. 1478, 1489 (1998) (Scalia, J. concurring and noting use of material supportive of bills never enacted as legislative history is to rely on history of "legislation-that-never was." The sole legislative history for the challenged amendments is the aforecited floor speech by Senator Lautenberg.

well-settled historical practice together with the irreconcilable conflict between the Seventh Circuit's decision and recent decisions of this Court discussing federalism principles, the requested Writ should issue.

I. The Panel Decision Failed to Identify Any Limitation on Federal Power over State Officers that Deliver, Receive, and Transport Firearms in the Discharge of their State Duties and Mistakenly Concluded Congress has Plenary Authority over the People's Right to Select the Citizens it Finds Most Qualified to Arm in the Public Interest Pursuant to the Militia Clause, the Second Amendment and the Tenth Amendment.

The power to select important state governmental officials is,

> [R]eserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."

Gregory, 501 U.S 452, 463 (1991) (quoting U.S. Const., Art. IV, §4). When Congress seeks to set social policy for the nation by means of its commerce clause power, however, "the authority of the people of the States to determine the qualifications of their government officials may be inviolate." *Id.* at 464.

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations.

Alden v. Maine, 1999 U.S. LEXIS at 4374 at *90. By imposing a firearm disability unknown at state or common law on state officers, Congress trenched on the state's entitlement to select its own officers under the Federal Constitution.

The People have an explicit right to retain firearms protected by the Second Amendment, and have an explicit right to determine the qualifications of their militia officers under the Militia Clause in the U.S. Constitution. *See* Art. I, Cl. 8. All 50 states have hiring qualifications and training criteria for those empowered to issue and possess public interest weapons.[3] All states appear to provide for organization of militias that possess firearms in the public interest.[4] Most states have some

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[3] *See e.g.* Ala. Code §§36-21-0 to -52 ; Ariz. Rev. Stat. Ann. §§18.65.010 et seq.; Cal. Pen. Code §§1350 et seq.; Colo. Rev. Stat. §§24-31-301 to -307; Del. Code Ann., tit. 11 §9200; Fla. Stat. Ann. §§943.01 et seq.; Ga. Code Ann. §§35-8-1 to -22; Haw. Rev. Stat. §§353C-1 to 353C-5; Ill Ann. Stat. Ch. 121, ¶¶ 307.8 and 307.9; Kan. Stat. Ann. §§74-5601 to 5617; Me. Rev. Stat. Ann. tit. 25, §§2803A to 2806; Mass. Gen. Laws Ann. Ch. 22C §§1 to 26; Mich. Comp. Laws Ann. §28.609; Minn. Stat. §§626.8453 et seq.; N.J. Stat. Ann. §40A:14-146.10, 52:17B-73, 53:1-4; N.M.S.A. 1978 §29-7-6; N.Y. Exec. Law §215; Ohio Rev. Code Ann. §§109.71 to 109.801; Or. Rev. Stat. §§181.030 to 181.497, 181.610 to 181.712; Pa. Stat. Ann. tit. 53 §§731 to 749; Tex. Gov't Code Ann. §§411.001 to 411.045, 413.001 to 413.020, 415.001 to 415.123; Utah Code Ann. §§53-6-101 to -211; Va. Code Ann. §§9-168 to 9-170, 15-131 to 15.1-159.7; Wash. Rev. Code Ann. §§43.101.010 to 43. 101.910; Wis. Stat. Ann. §§62.12 to 62.50, 165.85 to 165.90.

[4] Provisions authorizing organization of militias. *See e.g.* Ky. Const. Sec. 219; Iowa Code 29A.65 (West 1996); (1993); N.M. Const. art. XVIII, 1; N.D. Const. art. XI, Sec. 16; Ohio Const. art. IX, Sec. 1; S.C. Const. art. XIII, Sec. 1; S.D. Const. art. XV. 1; Utah

form of emergency provision that allows law enforcement personnel and others to be subject to the executive branch call to service.[5] The decision to call out the militia is one of fundamental state prerogative and is perhaps the ultimate policy-making choice that can be made by the state's executive officer. *See generally,* The Federalist No. 46, quoted at fn. 6 herein.

Deprivation of civil rights for misdemeanor conduct is almost unknown at state law and restoration of rights lost by misdemeanants is equally unknown. Traditionally, misdemeanor convictions have been viewed as neither a

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Const. art. XV, 1; Wyo. Const. art. XVII, 1; Ala. Code Secs. 31-2-2 to -5 (1994); Alaska Stat. 26.05.010 (1995); Ark. Code Ann. Sec. 12-61-101(b) (Michie 1995); Cal. Mil. & Vet. Code Sec. 122 (West 1988); Conn. Gen. Stat. Sec. 27-1 (1992); Ga. Code Ann. Sec. 38-2-3(d) (1994); Idaho Code Sec. 46-102 (1994); Ind. Code Ann. Sec. 10-2-3-1 (Burns 1992); Kan. Stat. Ann. Sec. 48-904(e) (1994); Miss. Code Ann. Sec. 33-5-1 (1994); Minn. Stat. Sec. 190.06 (1993); N.M. Stat. Ann. Sec. 20-2-2 (Michie 1989); N.Y. Mil. Law 2 (McKinney 1990); S.D. Codified Laws Ann. Sec. 33-2-2 (1994); Tenn. Code Ann. Sec. 58-1-104(d) (1989); Wyo. Stat. Sec. 19-2-102 (1994).

[5] *See e.g.* Alaska Const. Art. III, Sec. 19 (governor may call on militia to execute laws); Alabama Const., Art. V, §131 (1997) §131 (Governor is commander-in-chief); Ark. Stat. Ann. Sec. 12-61-117 (governor authority to draft militia); Idaho Code Sec. 46-602 (governor authority to declare martial law); O.C.G.A. (Georgia) Sec. 38-2-72 (emergency duties of militiamen); Montana Const. Art. VI, Sec. 13 (governor's authority with respect to militia); Mont. Code Anno. Sec. 10-1-402 (persons subject to governor's call); New York CLS Mil. Sec. 7 (draft of militia by governor); Minn. Stat. Ann. 190.06 (all citizens may be called into service by governor); N.C. Gen. Stat. Sec. 127A-87 (call to service provision).

material predictor of future violence, *Brown v. Bryan County*, 117 S.Ct. 1382, 1435 (1997) (Stevens, J., dissenting), nor a basis for depriving a citizen of fundamental rights regarding firearm possession. *See* Halbrook, S., *Firearm Law Deskbook* (5/96 release) at Appendix A (cataloging State laws) (43 states have constitutional right to bear arms) (fewer than five states permit any kind of firearm disability for non-felonies, and those that do place temporal limits on the deprivation); *see also Firearms States Laws and Published Ordinances*, ATF P 5300.5 (1994). Although the 1996 amendments rely on state convictions, no state criminal code punishes misdemeanants more harshly than felons, as do the 1996 GCA amendments.

Finally, the state's ability to rely on its own, carefully selected law enforcement officers in local and state emergency situations is significantly affected. Indeed, if Congress can initiate this interference, the gate is open to federal control to the point of disarming, state militias and law enforcement agencies for other misdemeanor conduct the States have chosen to ignore when hiring officers. Given the extensive intrusion on state prerogative occasioned by interference with domestic relations law, criminal law, public interest firearm possession and emergency responses by state militia members, and the concomitant elimination of the State's ability to compete for the affections of a mobile citizenry through innovation and experimentation in government, *Gregory v. Ashcroft*, 501 U.S. at 458, this Court should state a bright line rule that Congress must respect a state's sovereign right to empower whom it finds most qualified to issue and possess public interest firearms.

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

A. The Second Amendment and Militia Clauses Are Textual Guarantees that Congress May Not Interfere with Firearm Possession by State Officers. Any Federal Regulation Proposing to Control Firearm Possession by State Officers Discharging State Duties by Regulating the State Officer is Void.

This Court has never fixed the substantive right protected by the Second Amendment. *See e.g. Printz v. United States*, 521 U.S. 898, 937-38 & n.1, 2 (1997) (Thomas, J., concurring) (citing *United States v. Miller*, 307 U.S. 174 (1939)). The panel in this case noted the Second Amendment jurisprudence from this Court was "quite limited" *A/32* and even *Miller* was not "entirely illuminating" about the applicable standards. Clarification of the meaning, and modernization of the terminology of *Miller* would greatly assist parties throughout the Nation and the federal courts. *Miller* predates the development of tiered equal protection jurisprudence and thus is in a jurisprudential vernacular not readily useful. The panel expressly relied upon *Miller* to reject Gillespie's claim. *A/35*

The Second Amendment contains an express limitation on the federal government's authority to enact legislation, providing,

> [a]˜well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

The Militia Clauses, Article I, Section 8, cls. 15-16 provide:

> The Congress shall have power * * *
>
> To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
>
> To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., Amdt. X. The right that "shall not be infringed", *see United States v. Miller*, 307 U.S. 174, 179 (1939), has many probable meanings but is most conservatively taken in conjunction with the Tenth Amendment to mean Congress is possessed of no enumerated power that may materially infringe on the State's authority over the "appointment of officers" of its militia, which in

Indiana means all law enforcement officers. *See A/2* (panel citing Indiana law). This can only mean the qualifications of those serving in the militia cannot be subject to federal control. *See e.g. Lopez*, 514 U.S. at 567 (noting it considered case an enumerated powers case).

The substantive rights guaranteed by the Second Amendment and Militia Clauses, and safeguarded by and incorporated into the Tenth, must be viewed as among the principle structural guarantees of federalism and state sovereignty. *See e.g. Printz, fn. 13* (Justice Scalia warning against erroneous belief that the "Tenth Amendment is the exclusive textual source of protection for principles of federalism."); *see also Gregory v. Ashcroft*, 501 U.S. 452, 457 (discussion of dual sovereignty)

The militia played a key role in "a residuary and inviolable sovereignty," possessed by the states.[6] *See* The Federalist No. 39 at 245 (J. Madison); Blackstone's Commentaries, Vol. 2, Ch. 13, p. 409 points out "that king Alfred first settled a national militia in this kingdom," and traces the subsequent development and use of such forces.

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[6] The Federalist No. 46 (J. Madison). "To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. * * * Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of."

The panel found Gillespie failed to demonstrate the law enforcement firearm he possesses is related to the "preservation or efficiency of a well-regulated militia". *A/35. Miller* involved an indictment arising from defendant's transporting a firearm interstate without having it properly registered and without having in his possession a stamp-affixed written order. *Miller,* 307 U.S at 176. *Miller* thus involved a private citizen engaged directly in interstate travel with a private firearm. The instant case involves police officers operating wholly intrastate.

The *Miller* Court explicitly assumed every private citizen could challenge federal firearm regulation on the ground that the Second Amendment shielded the citizen's weapon from regulation because it, "has some reasonable relationship to the preservation or efficiency of a well regulated militia". *Miller,* 307 U.S. 178. A firearm that bore such a relationship would presumably be exempt from federal regulation. A well-regulated militia meant, "adequate defense of country and laws could be secured through the Militia – civilians primarily, soldiers on occasion." *Id.* 307 U.S. at 179. The purpose of securing safe execution of the laws in the townships and counties during times of crisis commends the law enforcement weapon as one that aids in the efficiency and preservation of the militia by definition. No able bodied male would willingly leave his family and fields if Sheriffs were not safely installed. As noted by the panel, *A/2,* Indiana's laws and Constitution refer specifically to the role of Sheriffs and police in times of militia mobilization. Under *Miller,* Gillespie demonstrated his public interest firearm is entitled to Second Amendment protection.

Even leaving the precise language of *Miller* aside and asking the question in light of today's jurisprudence, fundamental rights are those established in the text of the Constitution. *See e.g. Thornburg v. American College of Obstetricians*, 476 U.S. 747, 790 (1986) (White, J., dissenting). The Second Amendment and the Militia Clause secure explicit textual limitations on federal power. The beneficiaries of these protections are the "people" and the "States" respectively. This Court recently noted the phrase "the people" in the Second Amendment has the same meaning in both the Preamble to the Constitution and in the First, Fourth, Fifth, and Ninth and Tenth Amendments. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Because of their contemporaneous proposal and passage, the amendments of the Bill of Rights are read by this Court in *pari materia*, and amendments which contain similar language are construed similarly. *Patton v. United States*, 281 U.S. 276, 298 (1930) Thus "the people", as used in the Second Amendment supports a holding that the right to keep and bear arms is a personal right.[7] If the Second Amendment does not establish a

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[7] The secondary literature indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. *See e.g.* J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo.L.J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the

personal right it surely cannot be understood to mean less than establishing a collective right to facilitate the availability of the militia.

This is a first impression case for this Court involving 18 U.S.C. §925 and public interest weapons. Gillespie established he is a sworn law enforcement officer who carries a public interest firearm wholly intrastate. He established he carries the firearm pursuant to a parallel State constitutional firearm right, and fixed municipal and statutory duties the discharge of which requires he possess firearms. Since Gillespie is a state officer with fixed state duties his public interest firearm is entitled to be shielded from federal regulation.

Second Amendment, 82 Mich.L.Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. *See e.g.* Bogus, Race, Riots, and Guns, 66 S.Cal.L.Rev. 1365 (1993); Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551 (1991); Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale L.J. 661 (1989); Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am.Hist. 22 (1984).

II. Congress exceeded its Commerce Clause authority and violated the Tenth Amendment when it specifically targeted and disarmed state officials and eliminated the Public Interest Exemption solely with respect to those Officers affected by the 1996 amendments. This case involves the use of Federal criminal sanctions to exclude citizens from service as State Officials and in the State Militia, not application of a commercial statute to private conduct. Congress' power to pass legislation regulating commerce does not give it authority to regulate and determine sovereign decisions regarding public interest firearm possession nor may it alter the framework of dual sovereignty by enacting such laws.

Relying on cases involving private firearms, the Seventh Circuit Court of Appeals held explicit federal control of state officers and their firearm related duties does not state a violation of the Tenth Amendment because "Congress has the power to regulate the interstate trade in firearms." *A/22.*

> Nor is it constitutionally significant that the firearms ban now happens to include individuals employed in state and local law enforcement or who would otherwise be qualified to serve in state militias.

A/24-25. The decision of the panel permitting application of Section 922(g)(9) to state and local employees whose state law duties require they carry firearms conflicts with the express terms of the U.S. Constitution and the decisions of this Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144, 166 (1992); *Printz v. United States*, 521 U.S. 1033 (1997) and *United*

States v. Lopez, 514 U.S. 549 (1995). In *Pennsylvania Department of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998) this Court explicitly noted the extent of the commerce clause power is an open question and the authority represented by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54 (1985) is suspect. The rationales of the aforecited cases cannot be swept aside by bare characterizations or the reduction of the Tenth Amendment to an empty tautology.

The panel in this case ignored the post-*New York v. United States*, 505 U.S. 144, 156-57 (1992) jurisprudence cited above and performed an invalid analysis under the Commerce Clause, one devoid of any of the federalism concerns expressed in cases like *Lopez* and present here. This contention is exemplified by the exclusive reliance by the District Court and the Seventh Circuit panel on firearm cases involving private possession of firearms. *See A/19; A/57-58.* Neither the government nor any court has identified a single case that declares firearm possession by law enforcement or state militia members a commercial event subject to federal regulation.

Congress' commerce clause power is "subject to outer limits" and must be "considered in light of our dual system of government" to avoid "a completely centralized government." *Lopez*, 514 U.S. at 567. The constitutional fact of "a Federal government of enumerated powers" rejects of its own force any and all arguments that "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *see e.g. Pennsylvania Department of Corrections v. Yeskey*, 118

S.Ct. 1952 (1998) (noting reach of commerce clause power is open question).

Despite the absence of authority to support its conclusion, the panel treats the Tenth Amendment as empty of any structural content, and concludes its flawed commerce clause analysis disposes of any Tenth Amendment problem. *A/22* (if commerce clause power validly exercised, there is no Tenth Amendment problem). The tautological nature of the panel's analysis runs contrary to the whole line of recent Supreme Court cases cited above and should be rejected.

A. Congress' limited authority to regulate private conduct does not give it broad power to control the conduct of State officials or exclude them from service in State Government.

Reliance on cases involving private firearms that do not implicate the "public interest" exemption of 18 U.S.C. §925 ignores Congress' specific deletion of the public interest exemption solely with respect to the 1996 amendments. As this Court observed in *Printz v. United States*, 117 S.Ct. 2365, 2382 (1997), "[t]o say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance." The conduct of police officers in carrying a state-issued firearm in the line of duty and in the public interest cannot be deemed private conduct any more than the on-duty conduct of CLEO's at issue in *Printz*.

The panel seems largely to ignore the significance of *Printz*, citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) for the proposition that states and

local governments must observe laws of "general application" and the firearm disability appearing at 922(g)(9) "is not directed at States or state officials." *A/27* If Congress cannot compel State executive officials to implement Federal policy choices, *Printz*, it cannot directly exclude State citizens from service in State government. This power to control the selection criteria for a State's officials, if it existed, would carry with it the power to control all of that State's officers.

The federal government has some power under the Fourteenth Amendment to assure *inclusion* in state government. However, the concept of state sovereignty presupposes the power of States or the people to choose general qualifications for state officers. *Gregory*, 501 U.S. at 463-468. The commerce clause power was used here to *exclude* individuals from state service. Local police departments charged with keeping the peace and protecting the public have always been one of the primary institutions of State government. *United States v. Lopez*, 514 U.S. 549, 563 (1995) (Court notes "in areas such as criminal law enforcement, states historically have been sovereign."). Relative to accepted ideas of state sovereignty, decisions about who may serve as police officers, who may carry a state-issued firearm in the public interest, and who should be subject to the Governor's militia call must be seen as beyond the reach of the commerce clause power.

B. This Court's prior cases forecloses a limited view of the Commerce Clause that finds the 1996 amendments lay within Congress' Commerce Clause power without considering how the Commerce Clause itself is limited by the Tenth Amendment.

The inverse relationship between the Commerce Clause and the Tenth Amendment requires more than reporting the current extent of Federal displacement of a residual State sovereignty. The principle of continued dual sovereignty embodied in the Tenth Amendment creates structural limits on the reach of the Commerce and Necessary and Proper Clauses, just as the Commerce and Supremacy Clauses limit the autonomy of State governments in areas of concurrent jurisdiction with the Federal Government.

> When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33 at 204 (A. Hamilton).

Printz, 117 S.Ct. at 2379.

After concluding the rule that Congress may regulate private firearm possession under the Commerce Clause is equally applicable to public interest firearm possession, the panel basically ignored the federalism concerns represented by the Second Amendment and the Militia clauses, U.S. Const., Art. I, §8, Cls. 15, 16, and rejected them as

bars to federal interference with public interest weapons issued by the States.

This Court's cases indicate the textual right to maintain a militia and to select its officers is controlling regardless of the source or prior transactional history of any firearm utilized, *Perpich v. Department of Defense,* 496 U.S. 334 (1990) (presupposing inviolable right of the States to engage in militia basic training and states' ability to rely on their own Guard in state emergency situations) and expressly reserve some inviolable, protected militia-related space into which a *private* firearm might fall. *See e.g. United States v. Miller,* 307 U.S. 174, 178 (1939) (the Second Amendment protects a right to keep and bear a firearm that bears "some reasonable relationship to the preservation or efficiency of a well regulated militia"); Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. §926 (1986)) (hereinafter "FOPA") (noting GCA purpose of preserving Amendments II and X rights)

If *private* firearms may be shielded from federal regulation by a connection to a State militia, it is inescapably evident that *public interest* firearms relied upon by the People to enforce executive and judicial decrees, and to protect their interests in times of emergency, are beyond the reach of federal control under the Commerce Clause. In the absence of a construction of the Second Amendment and Militia clauses by this Court authorizing Congress to control state firearm possession through its commerce clause power, there is no textual basis for the asserted power. This Court recently said, the Federal Government,

> [C]an claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

Alden v. Maine 1999 U.S. LEXIS 4374 at *58 (citations omitted). The authority to control state officers is not a necessary implication of the commerce clause power.

> [E]ven as to matters within the competence of the National Government * * * the States retain "a residuary and inviolable sovereignty."

Alden v. Maine, 1999 U.S. App. LEXIS 4374 at *16 (citing The Federalist No. 39); *New York v. United States*, 505 U.S. 144, 166 (1992).

Under the panel's reading of the Constitution and this Court's decisions, 18 U.S.C. §925(a) is simply Congress' opportunity to declare the extent of federal displacement of state prerogative. By this rationale, the gate is open for Congress to effectively disarm any state militia and any law enforcement officer and any State governor by simply declaring all misdemeanor convictions trigger new federal firearm possession bans.

Congress is mistaken about the extent of its powers; if the unamended §925(a)(1) did not exist, it would have to be invented. It is the provision that allowed the Gun Control Act of 1968 to pass Tenth Amendment, Second Amendment and Militia Clause muster in 1968. *See e.g.* Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. §926 (1986)) (hereinafter "FOPA") (noting GCA purpose of preserving Amendments II and X rights); *see also Printz v. United States*, 521 U.S. 898, 905 (1997) (historical evidence that "earlier

Congresses avoided use of [the] highly attractive power [to compel state executive officers to administer federal programs]" gave us "reason to believe that the power was thought not to exist"); *accord Alden v. Maine*, 1999 U.S. LEXIS 4374 at *65 (citing *Printz*, noting early Congressional practice suggests no power over state-issued firearms).

> It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States . . .

General Oil Co. v. Crain, 209 U.S. 211 (1908); "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States", *New York*, 505 U.S. at 166.

> The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in New York because the former is addressed to individuals – namely CLEOs – while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. * * *

Printz, 521 U.S. 898, ___, 117 S.Ct. 2365 at 2382 (1997). Section 922(g)(9), when read in *pari materia* with the amendment to §925(a)(1) demonstrates Officer Gillespie

is being constrained in his official capacity as a state militia member and law enforcment officer.

In seeking to disarm on-duty state and local police officers, Congress has acted in an area where its commerce clause authority is at its weakest and federalism concerns are at their greatest. The commerce clause power wanes as Congress ventures into areas traditionally left to the states.

> Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.

Lopez, 514 U.S. at 564. When Congress regulates firearm possessions that have no obvious commercial nexus, by a statute that is criminal rather than commercial in nature, its commerce power is exceeded. To uphold the 1996 GCA Amendments would "bid fair" to transform Congress' limited, enumerated power to regulate commerce into a general police power that the Constitution reserves to the states. This court should hold the 1996 GCA Amendments exceeded Congress' authority.

Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. *See New York v. United States*, 505 U.S. at 155-169; *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in judgment in

part and dissenting in part); *Lopez*, 514 U.S. at 577 (Kennedy, J., joined by O'Connor, J., concurring); *accord Pennsylvania Dep't of Corrections v. Yeskey, supra.*

III. The Court of Appeals' Determination that Congress May Compel All Non-Federal Law Enforcement Agencies to Observe a Domestic Violence Misdemeanant-Free Hiring Policy Pursuant to its Power to Regulate Commerce Conflicts with *United States v. Lopez* and Other Relevant Decisions of this Court and contravenes Indiana's Policy Choices as Represented in her Statutes and Constitution.

The Court of Appeals concluded insertion of a "jurisdictional element" somehow transformed §922(g)(9) from being an unconstitutional intrusion on its face, to being constitutional as applied to state officers carrying public interest firearms. *A/19-20.* The panel failed to consider §922(g)(9) in *pari materia* with §925(a)(1) concluding *United States v. Bass*, 404 U.S. 336, 339, n.4 (1971) established Congress' authority to regulate *any firearm that has traveled in interstate commerce. Id.* The panel's holding cannot be squared with a plain reading of the Gun Control Act as amended nor with *Bass* or the federalism concerns discussed in *United States v. Lopez.*

The *Bass* Court declined to reach the Second Amendment constitutional question because it reversed on a statutory construction ground. The *Bass* Court found the absence of the jurisdictional element cited above fatal to the government's prosecution; it did not say the presence of one would have compelled the conclusion that all federal regulation of firearms is constitutional on its face.

To the contrary this Court expressly left open the question "whether upon appropriate findings Congress can constitutionally punish 'mere possession' of firearms," no matter what the transactional history of the weapon. *Bass*, 404 U.S. at 339 n.4.

The independent judicial duty to evaluate Congressional enactments for *ultra vires* action forecloses the Court of Appeals' decision to rely exclusively on the so-called jurisdictional element of §922(g)(9) to declare the simultaneous amendment of §922(g)(9) and §925(a)(1) a valid exercise of the commerce clause power. *United States v. Lopez*, 514 U.S. at 563; *Alden*, 1999 U.S. LEXIS at 4374 at *45 (noting Supremacy Clause argument leads to question of whether law is valid exercise of national power). The Circuits have erroneously declared the question of whether Congress' has acted in an *ultra vires* manner non-justiciable, provided the magic "jurisdictional element" is in the challenged enactment. This is an impermissible delegation to Congress to declare the extent of its own power, the precise power rejected in *Lopez*. *See also Alden*, 1999 U.S. LEXIS at 4374 at *46 ("We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States.") Congress simply does not have the power to call a highly trained, sworn police officer's wholly intrastate firearm possession an interstate commercial event. Nor does Congress have the power to compel elected State officers empowered to issue firearms to refuse to arm those officers the People have chosen to be armed in their interest. Congress' Commerce Clause reach has exceeded its legal grasp. *See Lopez*, 514 U.S. at 564 (noting commerce clause power wanes in areas of traditional sovereignty).

CONCLUSION

The 1996 GCA amendments violate the structure of federalism by impugning the States' and People's inviolable authority to choose the qualifications of its officers empowered to issue and receive public interest firearms. The possession or delivery of a firearm by a state officer executing state duties is not a commercial event within the purview of Congress' commerce clause authority. The Second Amendment protects a personal right to possess a firearm that may be impaired only to serve a compelling governmental interest that is itself a proper and legitimate federal goal. Control of state officers to create a federal policy is not a legitimate constitutional goal after *Printz*. In the words of The Federalist, the 1996 GCA amendments are "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33 at 204 (A. Hamilton).

The People's right to keep and bear arms in the collective sense is a right to select the qualifications of those empowered to carry a public interest firearm in the discharge of state duties and is a fundamental aspect of the sovereignty which the People enjoyed before the ratification of the Constitution. That right retained today and is beyond the reach of the commerce clause power.

Respectfully submitted,

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JERALD GILLESPIE, Plaintiff-Appellant, v. CITY OF INDIANAPOLIS, INDIANAPOLIS POLICE DEPARTMENT, and MICHAEL ZUNK, CHIEF OF POLICE, Defendants-Appellees, and UNITED STATES OF AMERICA, Intervenor-Appellee.

No. 98-2691

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 185 F.3d 693; 1999 U.S. App. LEXIS 15117; 15 BNA IER CAS 520

July 9, 1999, Decided

COUNSEL: For JERALD GILLESPIE, Plaintiff – Appellant: William J. Friedman, Santa Fe, NM USA.

For CITY OF INDIANAPOLIS, INDIANAPOLIS POLICE DEPARTMENT, MICHAEL H. ZUNK, Defendants – Appellees: Dale R. Simmons, OFFICE OF THE CORPORATION COUNSEL, City Counsel Legal Division, Indianapolis, IN USA.

For UNITED STATES OF AMERICA, Intervenor – Appellee: Robert M. Loeb, Mark B. Stern, DEPARTMENT OF JUSTICE, Civil Division, Appellate Section, Washington, DC.

JUDGES: Before Cudahy, Ripple, Rovner, Circuit Judges.

OPINION BY: ROVNER

OPINION: ROVNER, Circuit Judge. By virtue of 1996 amendments to the Gun Control Act of 1968 which prohibit persons convicted of domestic violence offenses from possessing firearms in or affecting commerce, Jerald Gillespie can no longer carry a firearm. *See* 18 U.S.C. § 922(g)(9). As a result, he has lost his job as a police

officer. Gillespie filed suit against the City of Indianapolis[1] seeking to have the statute declared unconstitutional and his employment with the Indianapolis Police Department preserved. The United States intervened to defend the constitutionality of the statute. The district court dismissed Gillespie's complaint, rejecting each of his constitutional arguments. *Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811 (S.D. Ind. 1998). *Gillespie* appeals, renewing his arguments that the statute violates the Tenth Amendment, the equal protection component of the Fifth Amendment's due process clause, and the Second Amendment. We affirm.

I.

Gillespie has worked as an Indianapolis police officer for more than twenty-five years. Not surprisingly, the responsibilities of that job have required him to carry and on occasion use a firearm issued to him by the Indianapolis Police Department, although never outside the state of Indiana. As a local police officer, Gillespie is subject under certain circumstances to the Indiana governor's call to serve in the state's militia (more commonly referred to as the Indiana National Guard). *See* Ind. Const. art. 5, § 12, art. 12, § 1; Ind. Code §§ 10-2-3-1, 10-2-3-2, 36-8-3-15.

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[1] Gillespie also named as defendants the Indianapolis Police Department and Michael Zunk, the Chief of Police. The district court dismissed them from the case, noting that the police department is a municipal department that cannot be sued apart from the city and that Zunk was sued in his official capacity alone. *Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811, 816 (S.D. Ind. 1998).

In 1996, Congress approved, and the President signed into law, a number of amendments to the Gun Control Act of 1968. Among them was an amendment sponsored by New Jersey Senator Frank Lautenberg, which as codified provides that "it shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(9).[2] The amendment took effect immediately. A

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[2] A "misdemeanor crime of domestic violence" is defined as a federal or state misdemeanor which "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(A)(ii). The Bureau of Alcohol, Tobacco, and Firearms construes this definition to include "all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery) if the offense is committed by one of the defined parties." Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Open Letter to All State and Local Law Enforcement Officials (last modified February 27, 1998) http://www.atf.treas.gov/core/firearms/information/opltrleo.htm>. "This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor." *Id.* Accord *United States v. Meade*, 175 F.3d 215, 1999 WL 281076, at *2-*6 (1st Cir.); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

separate provision of the Gun Control Act exempts the state and federal governments from most of the firearms disabilities specified in the statute, thereby allowing members of the armed services and law enforcement agencies who might otherwise be prohibited from carrying firearms to do so in connection with their public responsibilities. 18 U.S.C. § 925(a)(1). However, by its express terms, that provision of the statute does not apply to the firearms disability set forth in section 922(g)(9). Therefore, although an individual with a prior felony conviction, *see* 18 U.S.C. § 922(g)(1), might theoretically be able by virtue of this exemption to carry a gun in connection with federal or state employment, a person previously convicted of a misdemeanor crime of domestic violence cannot.

In October 1995, Gillespie pleaded guilty to a misdemeanor charge of battery involving his former wife. It is undisputed that this offense constitutes a "misdemeanor crime of domestic violence" for purposes of section

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The statute also provides that a person shall not be considered to have been convicted of such an offense unless he was represented by counsel in the misdemeanor proceeding or knowingly and intelligently waived the right to counsel, and, in cases wherein the defendant is entitled to a jury trial, he either was tried by a jury or knowingly and intelligently waived the right to a jury trial. *Id.* § 921(a)(33)(B)(i). Nor shall a person be deemed to have committed such a crime if his conviction has been set aside or expunged, or if the offense is one for which the individual has been pardoned or has had his civil rights restored, unless the pardon, expungement, or restoration of rights expressly bars the individual from shipping, transporting, possessing, or receiving firearms. *Id.* § 921(a)(33)(-B)(ii).

922(g)(9). *See* n.2, *supra*. Consequently, federal law renders it a felony for Gillespie to possess a firearm in or affecting commerce. Although the complaint does not allege that the gun issued to Gillespie by the Indianapolis Police Department ever moved in interstate commerce, it appears to concede that point (R. 1 P 91), and Gillespie makes no argument that his service weapon might never have moved across state lines. We shall therefore assume, as Gillespie himself does, that Gillespie's possession of a service weapon would be "in or affecting commerce" and therefore within the proscription of the federal statute. *See*, e.g., *United States v. Wilson*, 159 F.3d 280, 286-87 (7th Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 4247, 1999 WL 185841 (U.S. June 21).

The Indianapolis Police Department itself has concluded that Gillespie can no longer carry a firearm. Because department policy requires that every police officer be trained and equipped to possess and use a firearm, the department has further concluded that Gillespie is no longer eligible to serve as a police officer. It has accordingly notified him that he will be terminated from the department's employ.

Gillespie's complaint challenged the new federal firearms ban on several constitutional grounds, each of which the district court rejected in its thorough opinion. We address only the portions of Judge Barker's decision addressing claims that Gillespie pursues on appeal.

Judge Barker found that the enactment of section 922(g)(9) did not exceed the authority of Congress to regulate interstate commerce. She reasoned that because the government must in every prosecution establish that

the firearm in question either was shipped or transported "in interstate or foreign commerce" or was possessed "in or affecting commerce," the firearms ban has the requisite jurisdictional nexus to interstate commerce. 13 F. Supp. 2d at 822.

She also did not believe that the legislation intruded upon state sovereignty in violation of the Tenth Amendment. In her view, the statute did not supplant state domestic violence law, as *Gillespie* suggested. "States remain free to define and punish domestic violence crimes as they wish; however, the federal government imposes a federal firearms disability in addition to any action taken or not taken by the states." *Id.* at 819. Neither was Congress effectively dictating the qualifications of state and local officials by imposing the firearms ban. Although, as a result of the new ban, state and local law enforcement agencies might well decline to employ persons with domestic violence convictions, the federal government was not compelling that decision: "Such agencies may reassign officers to different divisions or 'desk jobs,' create special non-firearm units that use other weapons like nightsticks or remain unarmed, or even change the firearms requirement for on-duty officers." *Id.* at 820. Nor, finally, was Congress forcing the states to administer or enforce a federal regulatory program. "[Section] 922(g)(9) regulates the behavior of private individuals, not states, for individuals will be [federally] prosecuted for violation of the statute and there is no federal mandate for states to assist in regulation and enforcement." *Id.* at 821.

After determining that the statute implicated no fundamental right (*id.* at 823), Judge Barker next concluded

that the firearms ban did not deprive those convicted of domestic violence crimes of equal protection. "Preventing domestic violence misdemeanants from possessing a firearm is reasonably related to the legitimate government purposes of keeping firearms out of the hands of potentially dangerous or irresponsible persons and protecting victims of domestic violence from being murdered by their attackers." *Id.* at 824. She rejected Gillespie's contention that the statute has an impermissibly disproportionate impact on law enforcement officials, noting that the statute is facially neutral and that the legislative history evinces no discriminatory intent. *Id.*

Finally, Judge Barker concluded that section 922(g)(9) did not violate any rights that the Second Amendment might bestow upon Gillespie, either as an individual or in his capacity as a police officer. She found it unnecessary to decide whether the Constitution preserved a collective or individual right to bear arms or what level of scrutiny a court must apply to a restriction on that right, for she was confident that the statute would survive even strict scrutiny. The underlying government interests that she had identified (again, disarming persons that Congress reasonably believed to be dangerous or irresponsible, and protecting the victims of domestic violence from being killed) were compelling. The law was also narrowly tailored to serve those interests in the sense that the firearms ban applied only to those already convicted of domestic violence offenses. *Id.* at 827.

II.

A.

The system of government established by our Constitution is one of dual sovereignty in which the States, having ceded considerable authority to the federal government, nonetheless retain "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 2376, 138 L. Ed. 2d 914 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)). A number of constitutional provisions reflect the conservation of state sovereignty, *see* 117 S. Ct. at 2376-77, but at the heart of them lies the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Gillespie asserts that section 922(g)(9) violates the Tenth Amendment's guarantee of state sovereignty by rendering individuals with convictions for misdemeanor domestic violence unable to carry firearms and, as a result, ineligible to participate in state militias. (Recall that as an Indianapolis police officer, Gillespie is subject to the Governor's call to serve in the Indiana militia.) Gillespie acknowledges that Congress does have the authority to regulate commerce among the States, and the reach of the statute is expressly limited to firearms which have a link to interstate commerce. But as applied to individuals like himself, Gillespie reasons, the statute has the effect of proscribing the intrastate possession and use of firearms for law enforcement purposes. Section 925(a)(1) avoids that consequence with respect to other

provisions of the Gun Control Act by lifting the firearms disabilities for those serving state and local governments, but it leaves undisturbed the ban imposed by section 922(g)(9). In this way, Gillespie argues, the statute strips the States of their right to establish the qualifications for the officers who serve in their militias. Moreover, the statute produces that result by (in Gillespie's view) compelling state officers to implement a federal statute and by intruding upon areas of traditional state sovereignty in violation of the Tenth Amendment.

1.

Before reaching the merits of the Tenth Amendment arguments, we must first consider whether *Gillespie* has standing to make them. The United States contends that he does not. It reasons that any aspect of state sovereignty impinged upon by the Gun Control Act is one that the State, rather than an individual, must assert. The government has the apparent support of the Supreme Court's opinion in *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118, 144, 59 S. Ct. 366, 372-73, 83 L. Ed. 543 (1939), which observed in passing that "absent the states or their officers," private parties "have no standing . . . to raise any question under the [Tenth] Amendment." *See* also *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir.) ("insofar as the tenth amendment is design to protect the interest of states qua states," standing of private party "may be seriously questioned"), cert. denied, 454 U.S. 1081, 102 S. Ct. 635 (1981). It is particularly inappropriate to allow a private individual to raise such concerns, the United States suggests, where, as here, the state or local government whose Tenth Amendment interests are being advocated is a

party to the case and takes a contrary position. *See Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761-62 (10th Cir. 1980), cert. denied, 450 U.S. 1050, 101 S. Ct. 1770, 68 L. Ed. 2d 246 (1981). Yet, "standing barriers have been substantially lowered" in the decades since the Supreme Court decided *Tennessee Elec. Power Co., United States v. Richardson*, 418 U.S. 166, 193, 94 S. Ct. 2940, 2954, 41 L. Ed. 2d 678 (1974) (Powell, J., concurring), and a difference of opinion among the lower courts exposes the unsettled nature of the issue.[3]

The standing requirement inheres in the constitutional limitation of the judicial power to "Cases" or "Controversies." U.S. Const. Art. III, § 2. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055,

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[3] *Compare Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992); *Atlanta Gas Light Co. v. United States Dep't of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir.), cert. denied, 459 U.S. 836, 103 S. Ct. 81, 74 L. Ed. 2d 78 (1982); and *Metrolina Family Practice Group, P.A. v. Sullivan*, 767 F. Supp. 1314, 1320 (W.D. N.C. 1989), aff'd, 929 F.2d 693 (4th Cir.) (unpublished), text in Westlaw, 1991 WL 38691 (all finding individual standing to make Tenth Amendment claims), with *Costle*, 630 F.2d at 761-62; *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998) (both finding that private organizations lacked standing to make Tenth Amendment claims), and *Travis v. Reno*, 12 F. Supp. 2d 921, 923 (W.D. Wis.) (acknowledging "compelling doubts" regarding standing of individual plaintiffs to invoke Tenth Amendment, but finding it unnecessary to resolve the question given presence of State plaintiffs), rev'd, 163 F.3d 1000, 1002 (7th Cir. 1998) (likewise finding it unnecessary to assess standing of individual plaintiffs), petition for cert. filed, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818).

1067, 137 L. Ed. 2d 170 (1997). "The essence of the standing inquiry," the Supreme Court has explained, "is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S. Ct. 2620, 2630, 57 L. Ed. 2d 595 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962)). That "personal stake" requires first a " 'distinct and palpable injury' to the plaintiff," ibid. (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975)), that is, an "injury in fact" rather than a harm that is merely conjectural, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). It requires as well as "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct.' " *Duke Power*, 438 U.S. at 72, 98 S. Ct. at 2630 (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261, 97 S. Ct. 555, 561, 50 L. Ed. 2d 450 (1977)); *see* also *Citizens for a Better Environment*, 118 S. Ct. at 1016-1017; *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136. Finally, it must be likely that the court will be able to redress the plaintiff's injuries through the exercise of its remedial powers. *Duke Power*, 438 U.S. at 74, 98 S. Ct. at 2631; *see* also *Citizens for a Better Environment*, 118 S. Ct. at 1017; *Lujan*, 504 U.S. at 561, 112 S. Ct. 2136.

The standing argument that the United States advances can in part be understood as one focused on the nexus between the injury of which Gillespie complains and the constitutional right he is asserting. Practically speaking, the Gun Control Act as amended deprives Gillespie of the ability to carry a gun, and any constitutional defect that he can identify in the statute, including a violation of the Tenth Amendment, paves the way to relief, because it will render the firearms disability imposed upon him void. In pragmatic terms, his standing is therefore easy to appreciate. The theoretical nexus between his injury and any violation of the Tenth Amendment, however, is less clear. Yes, Gillespie is constrained by the statute, but is he really injured by any Tenth Amendment violation reflected in that statute? The Tenth Amendment protects the sovereignty of the States, and Gillespie's individual ability to carry a gun has nothing to do with Indiana's status as a sovereign. True enough, before Congress stepped in, Indiana had not chosen to bar those convicted of domestic violence offenses from possessing guns, and indeed it might never have elected to do so. But it could have done so, and in that event, Gillespie would be in the very same situation he finds himself today. Any injury to him by virtue of a Tenth Amendment violation is in this way incidental; it is really the State's ox being gored.

Duke Power rejects any categorical requirement that there be a logical nexus between the plaintiff's injury and the nature of the constitutional right he asserts, however. The plaintiffs in *Duke Power* were individuals who lived and worked in proximity to the sites of two planned, but not yet constructed, nuclear power plants. They filed suit

to have the PriceAnderson Act, 42 U.S.C. § 2210, declared unconstitutional. That statute establishes limitations on the liability of those involved in the design and construction of nuclear power plants. The prospective injuries that the Court found sufficient to convey standing on the plaintiffs were the types of adverse effects that a nuclear power plant could be expected to visit upon those living and working near it: the release of small amounts of radiation into the surrounding air and water and a reduction in property values, for example. *See* 438 U.S. at 72-73, 98 S. Ct. at 2630. Those injuries were "fairly traceable" to the Price-Anderson Act, the Court concluded, because without the limitation of liability imposed by that statute, some vital participants in the construction of nuclear plants – including architects, engineers, and smaller manufacturers of component parts – would likely have withdrawn from the industry. The liability protection afforded by the statute thus eliminated a major obstacle to the construction of the nuclear plants from which the plaintiffs anticipated injury. *Id.* at 75-77, 98 S. Ct. at 2631-32. A declaration that the act was unconstitutional would to that extent prevent the plaintiffs' prospective injuries by rendering the construction of the plants they feared unlikely. *See id.* at 76-77, 98 S. Ct. at 2632.

Notwithstanding this pragmatic connection between the plaintiffs' injuries and the statute they were challenging, the power company opposing their suit contended that they lacked standing because there was no nexus between these injuries and the particular constitutional rights being asserted. The plaintiffs were principally asserting that the statute violated the Fifth Amendment's

due process clause because the limited recovery permitted by the statute was not rationally related to the losses that might occur, because the statute purportedly encouraged laxity vis vis safety and environmental protection, and because the statute supplied no quid pro quo to the prospective victims of a nuclear accident in exchange for the abrogation of their common-law right to recover for their injuries. The bulk of the environment and health injuries claimed by the plaintiffs did not stem from the asserted due process violations, however. In fact, as the Court noted, the only category of injuries that would possess a subject-matter nexus to their due process claim would be injuries resulting from a nuclear accident causing damages in excess of the liability limits imposed by the statute. *Id.* at 78 n.23, 98 S. Ct. at 2633 n.23. Relying upon *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), a case that concerned taxpayer standing, the power company argued that the plaintiffs had no standing to invoke constitutional rights which were not logically related to the types of injuries they alleged.[4]

However, the Court was unwilling to extend such a requirement beyond the confines of taxpayer litigation.

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[4] The court in *Flast* stated:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.

392 U.S. at 102, 88 S. Ct. at 1954.

We . . . cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the "case or controversy" requirement of Art. III.

438 U.S. at 79, 98 S. Ct. at 2633-34.

Duke Power did aver to a prudential limitation on standing that returns us to the standing argument as the United States has framed it. " 'Even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *Id.* at 80, 98 S. Ct. at 2634 (quoting *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205). That limitation, the Court explained, avoids the adjudication of rights belonging to parties not before the court (and who might choose not to assert them), and ensures that when such rights are litigated, they are asserted by those most effectively situated to advocate them. *Id.* at 80, 98 S. Ct. at 2634.

However, *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), reveals that Gillespie, in making Tenth Amendment claims, actually is asserting his own rights. At issue in *New York* were the "take title" provisions of the federal Low-Level Radioactive Waste Policy Act of 1985, 42 U.S.C. § 2021e(d)(2)(C), which required the States either to enact legislation providing for the disposal of radioactive waste generated within their borders or alternatively to deal with the waste

administratively by taking title to and accepting possession of the waste. *See id.* at 153-54, 174-76, 112 S. Ct. at 2416, 2427-28. The Court concluded that Congress could not, consistent with the Tenth Amendment, compel the States to take either step. *Id.* at 176-77, 112 S. Ct. at 2428-29. One of the arguments voiced in defense of the law was that the very State making the constitutional challenge (*New York*), had been a party to the compromise reflected in the statute and that its officials had even spoken in support of the act's enactment before Congress. *See id.* at 180-81, 112 S. Ct. at 2431. Still, the Court reasoned, Congress was not free to violate state sovereignty by securing the "consent" of the States themselves. *Id.* at 182-83, 112 S. Ct. at 2431-32. Justice O'Connor explained:

> The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S. Ct. 2546, 2570, 115 L. Ed. 2d 640 (1991) (BLACKMUN, J., dissenting). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S.

[452], at 458, 111 S. Ct. [2395], at 2400 (1991). *See* The Federalist No. 51, p. 323 (C. Rossiter ed. 1961).

505 U.S. at 181-82, 112 S. Ct. at 2431.

We are therefore satisfied that *Gillespie* has standing to pursue a Tenth Amendment challenge to section 922(g)(9). He has suffered a concrete injury – the loss of the ability to carry a firearm, and the consequent loss of his job as a police officer. That injury can also fairly be traced to the constitutional violation that he attributes to Congress in enacting the amendments to the statute, for if we declared the statute unconstitutional, the firearms disability would be nullified and Gillespie would regain his right to carry a firearm. *See Duke Power*, 438 U.S. at 74-77, 98 S. Ct. at 2631-32. Finally, as *New York* explains, the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals. Gillespie consequently has standing to raise the Tenth Amendment violation notwithstanding what state or local officials themselves may have to say about the propriety of the statute.

2.

The Tenth Amendment does not itself demarcate the boundary dividing state from federal authority; its text "is essentially a tautology," *New York*, 505 U.S. at 157, 112 S. Ct. at 2418, declaring only that the States retain those powers not surrendered, *id.* at 156, 112 S. Ct. at 2418. Whether Congress has invaded the province reserved to the States by the Tenth Amendment is therefore a question that must be answered by inquiring whether Congress has exceeded the limits of authority bestowed upon

it by Article I of the Constitution. *See id.* at 156-57, 112 S. Ct. at 2418; *United States v. Wilson, supra,* 159 F.3d at 287. The Gun Control Act and its amendments were enacted pursuant to the Commerce Clause, which authorizes Congress to "regulate Commerce . . . among the several States . . . . " U.S. Const. art. I, § 8, cl.3. To resolve Gillespie's Tenth Amendment challenge to section 922(g)(9), then, we must first consider whether the provision reflects an appropriate exercise of the commerce power. Relying on *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), Gillespie contends that the firearms ban exceeds congressional Commerce Clause authority to the extent that it bans state and local law enforcement officials from possessing firearms wholly within the boundaries of a single State and in pursuit of their official duties.

The Supreme Court in *Lopez* explained that the Commerce Clause permits Congress to regulate three domains: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, as well as persons and objects in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id.* at 558-59, 115 S. Ct. at 1629-30. *Lopez* concerned a provision of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), which criminalized the knowing possession of a firearm within a school zone. Because that provision did not purport to regulate either the channels or instrumentalities of interstate commerce or the people and things moving in interstate commerce, section 922(q) could only be justified as an exercise of the congressional power to regulate activities substantially affecting interstate commerce. 514 U.S. at 559, 115 S. Ct. at 1630. The

Court concluded that the statute as written exceeded that aspect of the commerce power because on its face the provision had nothing to do with commerce or any kind of economic enterprise, it had no jurisdictional element ensuring by means of a case-by-case inquiry that a given firearm affects interstate commerce, and there were no congressional findings establishing a nexus between interstate commerce and the possession of guns in the vicinity of schools. *Id.* at 561-63, 115 S. Ct. at 1631-32.

As Judge Barker recognized, however, section 922(g)(9) includes the jurisdictional element that originally was omitted from section 922(q).[5] In other words, the statute prohibits persons convicted of domestic violence from possessing a firearm "in or affecting commerce." In the wake of *Lopez*, we have repeatedly found the inclusion of that jurisdictional element in other provisions of the Gun Control Act sufficient to overcome Commerce Clause challenges. *See United States v. Bell*, 70 F.3d 495, 497-98 (7th Cir. 1995) (section 922(g)(1)); *United States v. Lee*, 72 F.3d 55, 58-59 (7th Cir. 1995) (section 922(g)(1)); *United States v. Bradford*, 78 F.3d 1216, 1222-23 (7th Cir.), *cert. denied*, 517 U.S. 1174, 116 S. Ct. 1581, 134 L. Ed. 2d 678 (1996) (section 922(g)(1)); *United States v. Lewis*, 100 F.3d 49, 51-53 (7th Cir. 1996) (section 922(g)(1)); *United States v. Hardy*, 120 F.3d 76, 77-78 (7th Cir. 1997) (per curiam) (section 922(u)); *United States v. Williams*, 128 F.3d 1128, 1133-34 (7th Cir. 1997) (section 922(g)(1)); *United States v. Wilson*, 159 F.3d at 285-87 (section 922(g)(8)).

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[5] After the Supreme Court decided *Lopez*, Congress enacted a new version of section 922(q) containing a jurisdictional element.

Gillespie concedes that the jurisdictional language "may obviate a 'facial' constitutional challenge" to section 922(g) (9), but in his view that language does not alone suffice to validate the statute "as applied" to him. *Gillespie* Br. 20.

The defendants must [also] show a rational basis or substantial evidence for finding a substantial impact on interstate commerce exists, arising from the intrastate possession of a firearm in the public interest by a previously convicted misdemeanant who has carried a firearm in the public interest without incident for over 25 years. *Id.*

We have expressly rejected such an additional showing as unnecessary, however. Like *Gillespie*, the defendant in *Lewis* suggested that the Supreme Court's decision in *Lopez* required the government to establish that his possession of a firearm had a demonstrable impact on interstate commerce. We noted that in *Scarborough v. United States*, 431 U.S. 563, 575, 97 S. Ct. 1963, 1969, 52 L. Ed. 2d 582 (1977), which addressed the forerunner to the felon-inpossession ban now contained in section 922(g)(1), the Court found that the jurisdictional provision of the statute required no proof beyond "the minimal nexus that the firearm have been, at some time, in interstate commerce." *See* 100 F.3d at 50; *see* also *id.* at 52, discussing *United States v. Bass*, 404 U.S. 336, 349-50, 92 S. Ct. 515, 523-24, 30 L. Ed. 2d 488 (1971) (construing statutory forerunner to section 922(g)(1) to require proof that firearm was possessed in or affecting in interstate commerce, thereby avoiding conclusion that Congress had altered federal-state balance). Nothing in *Lopez* called the validity of this rationale into question. 100 F.3d at 52. As a result, we saw

no need for proof that a given firearm or a particular individual's possession of that firearm had a substantial impact on commerce. *Id.* at 51-53. In the aggregate, it was easy to see that the statute regulates interstate gun trafficking with the obvious aim of keeping firearms out of the hands of criminals; and this is the very kind of regulation that the commerce power permits. *See id.* at 52-53, quoting *United States v. Chesney*, 86 F.3d 564, 571-72 (6th Cir. 1996), cert. denied, 520 U.S. 1282, 117 S. Ct. 2470, 138 L. Ed. 2d 225 (1997), and *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir.), cert. denied, 519 U.S. 905, 117 S. Ct. 262, 136 L. Ed. 2d 187 (1996). All that need be shown in the individual case, then, was that the firearm in question had previously moved across state lines. 100 F.3d at 51-53. A single journey across state lines, however remote from the defendant's possession, is enough to establish the constitutionally minimal tie of a given weapon to interstate commerce, and to bring the defendant's possession of the gun within a framework of regulation whose connection to interstate commerce is more apparent. *Id.* at 52. *See* also *Wilson*, 159 F.3d at 286-87; *Bradford*, 78 F.3d at 1222-23; *United States v. Farnsworth*, 92 F.3d 1001, 1006-07 (10th Cir.), cert. denied, 519 U.S. 1034, 117 S. Ct. 596, 136 L. Ed. 2d 524 (1996); *McAllister*, 77 F.3d at 390.[6]

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[6] Cf. *United States v. Robertson*, 514 U.S. 669, 671, 115 S. Ct. 1732, 1733, 131 L. Ed. 2d 714 (1995) (finding it unnecessary to consider whether activities of RICO enterprise "affected" interstate commerce, where enterprise purchased supplies and equipment in interstate commerce and hired workers from out of state and in these ways came within scope of congressional power to regulate interstate commerce).

Gillespie makes no claim that the weapon issued to him by the Indianapolis Police Department might never have moved across state lines, and in acknowledging that the gun at the least has this minimal tie to interstate commerce, he has conceded away the only basis he might have for a Commerce Clause challenge to the statute. Without question, Congress has the power to regulate the interstate trade in firearms. Pursuant to that authority, it may act to stem the flow of guns to those whom it rationally believes may use them irresponsibly, including those whose convictions for domestic violence offenses reflect a propensity to inflict bodily harm upon others. The possibility that a particular individual might possess his gun solely within one state and for official purposes is irrelevant. So long as that gun has moved across state lines at least once, it is subject to the exercise of congressional Commerce Clause authority.

3.

If, as we have concluded, section 922(g)(9) reflects a valid exercise of the federal power to regulate interstate commerce, then it follows that Congress has not violated the Tenth Amendment by intruding upon an area of authority reserved to the States. *See New York v. United States, supra,* 505 U.S. at 156, 112 S. Ct. at 2417 ("if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States"); *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991) ("as long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States"); *Wilson,* 159 F.3d at 287. Gillespie suggests

that the statute nonetheless poses a Tenth Amendment problem by, for the first time, making it a federal offense for someone convicted of a misdemeanor to possess a firearm, and also by reaching the possession of firearms possessed in the public interest by state officials. Neither argument requires lengthy attention.[7]

Constitutionally speaking, there is nothing remarkable about the extension of federal firearms disabilities to persons convicted of misdemeanors, as opposed to felonies. The particular act criminalized by each subsection of 922(g) is the possession of a firearm (or ammunition) in or affecting commerce, an activity firmly within the scope of the commerce power.[8] *See Lopez*, 514 U.S. at 561-62, 115 S. Ct. at 1631, distinguishing *Bass, supra*, 404 U.S. 336, 92 S. Ct. 515. Congress long ago imposed this ban on felons, and because the ban applied only to guns possessed in or affecting commerce, the Supreme Court did not view the proscription as an unconstitutional intrusion upon state

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[7] Gillespie also appears to suggest that the statute amounts to an unprecedented intrusion upon state domestic law. *Gillespie* Br. 10-11. That is an argument made more logically with respect to 18 U.S.C. § 2261, which establishes a federal domestic violence offense. Section 922(g)(9) itself works no change upon state laws concerning domestic violence; it simply attaches a new federal consequence to a state conviction with respect to the possession of firearms in or affecting interstate commerce.

[8] Of course, the statute also forbids identified persons to ship or transport a firearm or ammunition in interstate or foreign commerce or to receive any firearm or ammunition that has been shipped or transported in interstate commerce. 18 U.S.C. § 922(g). We focus on the possession of a firearm in or affecting commerce, because it is the prohibition of that activity which most directly bears on Gillespie.

sovereignty. *See id.* The recent inclusion of some misdemeanants raises no new concerns. True, most misdemeanors are creatures of state law, but so are most felonies. *See Lopez*, 514 U.S. at 561 n.3, 115 S. Ct. at 1631 n.3. Criminalizing the possession of interstate firearms by individuals previously convicted of a state crime in no way redefines the elements the state offense or increases the punishment meted out for that offense. *See United States v. Jordan*, 870 F.2d 1310, 1314-15 (7th Cir.), cert. denied, 493 U.S. 831, 110 S. Ct. 101, 107 L. Ed. 2d 65 (1989); *see* also *United States v. Andaverde*, 64 F.3d 1305, 1310 (9th Cir. 1995), cert. denied, 516 U.S. 1164, 116 S. Ct. 1055, 134 L. Ed. 2d 199 (1996); *United States v. Minnick*, 949 F.2d 8, 10-11 (1st Cir. 1991), cert. denied, 503 U.S. 995, 112 S. Ct. 1698, 118 L. Ed. 2d 408 (1992); *United States v. Hicks*, 992 F. Supp. 1244, 1245-46 (D. Kan. 1997); *National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1575-76 (N.D. Ga. 1997), aff'd & adopted by *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998). The statute simply employs a state conviction as the predicate for a prohibition to engage in an activity over which Congress has broad authority. *See* generally *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 120, 103 S. Ct. 986, 996, 74 L. Ed. 2d 845 (1983); *Lewis v. United States*, 445 U.S. 55, 66, 100 S. Ct. 915, 921, 63 L. Ed. 2d 198 (1980); *see* also *United States v. Meade, supra*, 175 F.3d 215, 1999 WL 281076, at *8 (rejecting Tenth Amendment challenge to section 922(g)(8)).

Nor is it constitutionally significant that the firearms ban now happens to include individuals employed in state and local law enforcement or who would otherwise

be qualified to serve in state militias. The Tenth Amendment does reserve to the States and their citizens the power "to determine the qualifications of their most important government officials." *Gregory v. Ashcroft*, 501 U.S. at 463, 111 S. Ct. at 2402.[9] Yet, as Judge Barker emphasized, section 922(g)(9) is a criminal statute of general application that regulates individual behavior. 13 F. Supp. 2d at 820. It singles out no one by occupation or affiliation with state or local government. To the extent that the statute renders individuals like Gillespie ineligible for employment in state and local law enforcement and ineligible to serve in a state militia, it does so incidentally and as a result of a valid congressional exercise of the commerce power. *See National Ass'n of Gov't Employees*, 968 F. Supp. at 1575. Congress has not superseded the criteria state and local governments employ to select those serving on their behalf; it has instead, in the exercise of its authority over interstate commerce, merely rendered some individuals unable, as a practical matter,

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[9] But *see E.E.O.C. v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (upholding extension of Age Discrimination in Employment Act to state and local governments as a valid exercise of commerce power); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (upholding application of Fair Labor Standards Act to local transit workers and noting, *id.* at 550, 105 S. Ct. at 1017, that "apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself"); *see* also *Gregory*, 501 U.S. at 464, 111 S. Ct. at 2403 ("We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause.") (citing *Garcia*).

to meet one of the criteria that state and local governments have themselves established. *See* 13 F. Supp. 2d at 820; *see* also *Fraternal Order of Police v. United States*, 173 F.3d 898, 907 (D.C. Cir. 1999). It may be, as Gillespie suggests, that exceptions from the firearms disability embodied in section 925 reflect a congressional sensitivity to state prerogatives regarding local law enforcement, participation in state militias, and the like. But he cites no authority for the proposition that Congress was required to make these exceptions. *See id.* Given the far-ranging scope of interstate commerce in the modern era, many laws founded upon the commerce power will touch upon activities formerly regulated solely by the States. *See New York*, 505 U.S. at 158, 112 S. Ct. at 2418-19.

4.

Even in the exercise of one of its enumerated powers, Congress can run afoul of the Tenth Amendment by commandeering state officials to carry out federal mandates. *Printz v. United States, supra*, 117 S. Ct. at 2380-81; *New York v. United States*, 505 U.S. at 161, 166, 112 S. Ct. at 2420, 2423. Congress may not "compel the States to enact or administer a federal regulatory program," *id.* at 188, 112 S. Ct. at 2435, nor may it "conscript the State's officer's directly" by assigning to them responsibility for enforcing federal laws, *Printz*, 117 S. Ct. at 2384; *see Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818). Gillespie suggests that section 922(g)(9) effectively commandeers state and local governments by imposing a federal firearms disability that most States

themselves have not chosen to impose, rendering individuals like Gillespie, previously eligible to serve in state and local law enforcement (and State militias), no longer able to do so.

We discern no respect in which the statute commandeers state governments or their officers, however. Section 922(g)(9) is not directed at States or state officials. It is, as we have already pointed out, a criminal law of general application; as such, it regulates the behavior of individuals as individuals. *See Wilson*, 159 F.3d at 287; *Gillespie*, 13 F. Supp. 2d at 820. It is no doubt true, as *Gillespie* emphasizes, that Congress has now supplanted the choices States had previously made about the ability of misdemeanants to carry firearms. However, the Supremacy Clause (U.S. Const. Art. VI, cl. 2), permits Congress to trump state policies on subjects that Article I empowers Congress to address. *See New York*, 505 U.S. at 159, 112 S. Ct. at 2419. That is all that Congress has done here pursuant to its authority to regulate interstate commerce. In exercising that power, Congress has not compelled the States to regulate in its stead, as it had in New York; the firearms ban is instead imposed directly by federal law. Nor has Congress pressed state officials into service, a la Printz; responsibility to enforce the firearms ban rests with federal officials. The most that can be said is that, as a result of section 922(g)(9), state and local governments can no longer, for public interest reasons (law enforcement, to name the most pertinent example) issue guns to individuals convicted of domestic violence misdemeanors. But States and municipalities are obligated to follow laws of general application that Congress enacts in the valid exercise of its authority under the

Commerce Clause, *see Garcia*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016; *Travis*, 163 F.3d at 1002-03; the disarming of individuals like Gillespie merely follows from that obligation. *Minnick*, 949 F.2d at 10-11.

B.

The Due Process Clause of the Fifth Amendment obligates the federal government to afford citizens the equal protection of the laws. *See Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884 (1954); *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S. Ct. 612, 670, 46 L. Ed. 2d 659 (1976). Gillespie asserts that section 922(g)(9) is inconsistent with that obligation. The arguments that he makes in furtherance of this claim have less to do with the rational basis that Judge Barker attributed to the statute than with her threshold determination that the firearm ban need be reviewed for a rational basis and nothing more. Gillespie insists that the statute implicates a fundamental right – "the right of the people to keep and bear Arms" (U.S. Const. amend. II) – by precluding persons convicted of domestic violence offenses from carrying firearms in the public interest.[10] Therefore, he reasons, the firearms ban can only be sustained if it is narrowly tailored to serve a compelling government interest, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666, 110 S. Ct. 1391, 1401, 108 L. Ed. 2d 652 (1990) (strict scrutiny), or, at the

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[10] Gillespie no longer claims a fundamental property interest in government employment, as he did below. *Gillespie* Br. 26. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566, 49 L. Ed. 2d 520 (1976) (per curiam).

least, is substantially related to the service of an important government objective, *see United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 2275, 135 L. Ed. 2d 735 (1996) (intermediate scrutiny). *Gillespie* Br. 24. In Gillespie's view, the statute cannot survive more probing scrutiny than rational basis review because it is both underand over-inclusive. It is under-inclusive, he suggests, because it removes guns from the hands of individuals convicted of domestic violence offenses, while allowing persons convicted of other violent misdemeanors to remain armed. It is at the same time over-inclusive, he believes, in the sense that it prohibits those with domestic violence offenses in their past, no matter how few or how long ago, from carrying firearms for public interest purposes.

The premise of Gillespie's claim is foreclosed by this circuit's precedents. We shall have more to say about the nature of the right conferred by the Second Amendment in a moment. Insofar as Gillespie's equal protection claim is concerned, we need only note that we have twice rejected the contention that the right to possess a firearm is a fundamental one. *See United States v. Jester*, 139 F.3d 1168, 1171 (7th Cir. 1998); *Sklar v. Byrne*, 727 F.2d 633, 637 (7th Cir. 1984); *see* also *Lewis v. United States*, 445 U.S. at 66, 100 S. Ct. at 921. Judge Barker consequently did not err in declining to hold section 922(g)(9) to a more stringent test; the statute need only have a rational basis in order to satisfy the equal protection component of the Fifth Amendment's Due Process Clause. *See Jester*, 139 F.3d at 1171; *Sklar*, 727 F.2d at 637; accord *United States v. Smith*, 171 F.3d 617, 624 (8th Cir. 1999).

Like Gillespie, the defendant in *United States v. Lewitzke* suggested that it was irrational to impose a firearms disability solely upon those convicted of domestic violence misdemeanors, when other misdemeanor convictions might reflect just as much of a propensity to harm others. 176 F.3d 1022, 1999 WL 298492, at *2 (7th Cir.). We rejected that argument:

> Congress is free to "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955); *see* also *F.C.C. v. Beach Communications, Inc., supra*, 508 U.S. [307,] at 316, 113 S. Ct. [2096,] at 2102 [(1993)]. For a legislature concerned about the harm that may befall victims of domestic violence from firearms, persons already convicted of domestic violence are a logical starting, if not ending point. . . . By definition, those convicted of domestic violence offenses have already harmed their domestic partners in some fashion. It certainly would not be irrational for Congress to conclude that these individuals pose the most acute danger of turning a gun on a family member.

Lewitzke, 176 F.3d 1022, 1999 WL 298492, at *4. *See* also *Fraternal Order of Police*, 173 F.3d at 904; *National Ass'n of Gov't Employees*, 968 F. Supp. at 1573-75.

We likewise reject the notion that the firearms ban may be irrational to the extent it reaches individuals like Gillespie, who carry firearms in the public interest. That someone previously convicted of engaging in domestic violence may possess a firearm for public rather than private purposes does not negate the possibility that he

might use that gun against someone in his household. Congress could, therefore, reasonably conclude that the reasons for an individual carrying a gun are irrelevant and that it is the individual's criminal history which should determine his right to do so.[11]

C.

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The link that the amendment draws between the ability "to keep and bear Arms" and "[a] well regulated Militia" suggests that the

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[11] In his statement of the questions presented, Gillespie suggests that the statutory scheme may deny the equal protection rights of domestic violence misdemeanants because convicted felons are authorized to carry firearms in the public interest while misdemeanants are not. *Gillespie* Br. xi; *see* 18 U.S.C. § 925(a)(1). Gillespie's counsel pursued that same argument, initially with success, before the District of Columbia Circuit. *See Fraternal Order of Police v. United States*, 332 U.S. App. D.C. 49, 152 F.3d 998 (D.C. Cir.), reh'g granted, 159 F.3d 1362 (1998), on reh'g, 173 F.3d 898 (1999). Gillespie made no effort to develop this line of attack in the body of his brief, however, and has therefore waived the argument. E.g., *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 173 n. 1 (7th Cir. 1996). We do note that the D.C. Circuit has now retreated from its initial view that the statutory distinction between felons and misdemeanants is irrational. The court concluded on rehearing that Congress could have rationally believed that existing laws and practices were sufficient to handle the potential problems raised by the issuance of firearms to felons employed by state and federal agencies but were insufficient insofar as misdemeanants were concerned. 173 F.3d at 903-04.

right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia. The Supreme Court's jurisprudence on the scope of this amendment is quite limited itself, and not entirely illuminating. Sixty years ago, however, it did reject a Second Amendment challenge to an indictment charging the defendants with the unlawful transport in interstate commerce of an unregistered, double-barrel, twelve-gauge Stevens shotgun with a barrel length of less than eighteen inches. *United States v. Miller,* 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939). In the absence of "some reasonable relationship" between the gun and "the preservation or efficiency of a well regulated militia," the Court concluded, "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 178, 59 S. Ct. at 818. *See* also *Lewis,* 445 U.S. at 65 n.8, 100 S. Ct. at 921 n.8; *Konigsberg v. State Bar of Calif.,* 366 U.S. 36, 49 n.10, 81 S. Ct. 997, 1006 n.10, 6 L. Ed. 2d 105 (1961); *Adams v. Williams,* 407 U.S. 143, 151-52, 92 S. Ct. 1921, 1925, 32 L. Ed. 2d 612 (1972) (Douglas, J., dissenting); *Quilici v. Village of Morton Grove,* 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863, 104 S. Ct. 194, 78 L. Ed. 2d 170 (1983); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines,* 504 F.2d 1288, 1290 n.5 (7th Cir. 1974) (cited with approval by *Lewis,* 445 U.S. at 65 n.8, 100 S. Ct. at 921 n.8); *United States v. McCutcheon,* 446 F.2d 133, 135-36 (7th Cir. 1971). Whatever questions remain unanswered, *Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might

play in maintaining a state militia. *United States v. Wright*, 117 F.3d 1265, 1271-72 (11th Cir.), cert. denied, 522 U.S. 1007, 118 S. Ct. 584, 139 L. Ed. 2d 422 (1997), vacated in part on reh'g on other grounds, 133 F.3d 1412 (11th Cir.), cert. denied, 119 S. Ct. 217 (1998); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992), cert. denied, 507 U.S. 997, 113 S. Ct. 1614, 123 L. Ed. 2d 174 (1993). As such, the United States reasons, the right protected by the Second Amendment is indeed a collective rather than an individual one, and for that reason Gillespie has no standing to attack the Gun Control Act on Second Amendment grounds. *See San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1124-25 (9th Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir.), cert. denied, 519 U.S. 912, 117 S. Ct. 276, 136 L. Ed. 2d 199 (1996).

We believe that Gillespie may invoke the Second Amendment in his challenge to section 922(g)(9) for the same reasons that we concluded he has standing to invoke the Tenth Amendment. Simply put, the statute deprives him of the ability to possess a firearm and, consequently, has cost him his job as an Indianapolis police officer. If we were to conclude that the statute runs afoul of the Second Amendment, as Gillespie urges us to do, then the disability imposed by the statute would be void, and Gillespie would regain the opportunity to carry a firearm and (presumably) his employment with the Indianapolis police force. In other words, he has suffered a cognizable injury as a result of the statute's enactment, and that injury is one that would be redressed through a favorable ruling on his Second Amendment challenge. His claim therefore meets the pragmatic test articulated by *Duke Power*. *See* 438 U.S. 59 at 78-79, 98 S. Ct. 2620 at

2633-34, 57 L. Ed. 2d 595. We are also satisfied that prudential concerns do not stand in the way of his claim. *See id.* at 80-81, 98 S. Ct. at 2634. Although the Second Amendment appears on its face to secure a collective right (in much the same way that the Tenth Amendment guards state sovereignty), the right is constitutionally preserved not as an end in itself but as a means of securing liberty – thus the textual reference to "the security of a free State." U.S. Const. amend. II (emphasis ours). As a citizen of Indiana, we believe that Gillespie has standing to invoke a proviso aimed at preserving the State's security and freedom, notwithstanding the possibility that Indiana itself may have no objection to the statute under scrutiny. *See New York*, 505 U.S. at 181-82, 112 S. Ct. at 2431-32.[12]

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[12] Although our conclusion that Gillespie has standing to pursue a Second Amendment claim conflicts with the Ninth Circuit's holdings in *San Diego County Gun Rights Committee* and *Hickman*, we note that the great majority of precedents in this area have rejected Second Amendment challenges to firearms legislation on their merits and thus have implicitly rejected the notion that individuals lack standing to invoke the Second Amendment. E.g., *Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206; *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), cert. denied, 139 L. Ed. 2d 13, 118 S. Ct. 46 (1997); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813, 116 S. Ct. 64, 133 L. Ed. 2d 27 (1995); *Quilici*, 695 F.2d at 270; *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), cert. denied, 435 U.S. 926, 98 S. Ct. 1493, 55 L. Ed. 2d 521 (1978); *United States v. Warin*, 530 F.2d 103, 106-07 (6th Cir.), cert. denied, 426 U.S. 948, 96 S. Ct. 3168, 49 L. Ed. 2d 1185 (1976). Although many of these challenges were made in the context of criminal prosecutions, where standing rules appear to be somewhat more relaxed, *see Wright*, 117 F.3d at 1274 n.18 (citing *Morgan v. Virginia*, 328 U.S. 373, 375, 66 S. Ct. 1050, 1053, 90 L. Ed. 1317 (1946)), Second

Although the limited nature of the right guaranteed by the Second Amendment may not deprive Gillespie of standing, it does foretell the outcome of his challenge. For Gillespie has not convinced us that he can demonstrate a "reasonable relationship" between his own inability to carry a firearm and "the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178, 59 S. Ct. at 818. Yes, because Gillespie can no longer carry a gun, the Indianapolis Police Department has decided to fire him; and because he will no longer be a member of the Indianapolis police force, he will no longer be subject on that basis to the governor's call to serve in the Indiana militia. But *see Fraternal Order of Police*, 173 F.3d at 906. We shall also assume, as Gillespie suggests, that the state militia consequently will no longer have the benefit of the training and many years of service that Gillespie and others like him bring to the State when called to serve. But he does not argue (and we do not believe under any plausible set of facts that he could) that the viability and efficacy of state militias will be undermined by prohibiting those convicted of perpetrating domestic violence from possessing weapons in or affecting interstate commerce. *See id.*; *see also Wright*, 117 F.3d at 1273-74; *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), cert. denied, 139 L. Ed. 2d 13, 118 S. Ct. 46 (1997). Because Gillespie has no reasonable prospect of being able to demonstrate such a nexus between the firearms disability imposed by the statute and the operation of state militias,

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Amendment challenges have been raised and resolved on the merits in the civil context as well. *See*, e.g., *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *Quilici*, 695 F.2d at 270.

Judge Barker was right to dismiss his Second Amendment claim.

III.

Finding no constitutional defect in section 922(g)(9), we affirm the dismissal of Gillespie's complaint.

JERALD GILLESPIE, Plaintiff, vs. CITY OF INDIANAPOLIS, CITY OF INDIANAPOLIS POLICE DEPARTMENT and MICHAEL H. ZUNK, Defendants.

IP 98-0266-C B/S

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

13 F. Supp. 2d 811; 1998 U.S. Dist. LEXIS 8691

June 5, 1998, Opinion Filed

COUNSEL: For Plaintiff: William J. Friedman, Attorney at Law, Sante Fe, New Mexico.

For Plaintiff: John C. Ruckelshaus, Ruckelshaus Roland Kautzman & Hasbrook, Indianapolis, Indianapolis.

For Defendants: Marsha C. Massey, Assistant United States Attorney, Dale R. Simmons, Assistant Corporation Counsel, Indianapolis, Indiana.

JUDGES: SARAH EVANS BARKER, CHIEF JUDGE, United States District Court, Southern District of Indiana.

OPINION BY: SARAH EVANS BARKER

OPINION:

ENTRY DENYING PLAINTIFF'S MOTION TO STRIKE, GRANTING DEFENDANTS' MOTION TO DISMISS, GRANTING THE UNITED STATES' MOTION TO DISMISS AND DENYING AS MOOT PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiff's motion strike the United States' motion to dismiss and its jurisdictional arguments on standing and ripeness,

Defendants' motion to dismiss, the United States' motion to dismiss and Plaintiff's motion for preliminary injunction. For the reasons set forth below, we deny Plaintiff's motion to strike, grant Defendants' motion to dismiss, grant the United States' motion to dismiss and deny as moot Plaintiff's motion for preliminary injunction. In addition, Plaintiff requests oral argument on his preliminary injunction motion and the Defendants' and the United States' motions to dismiss. However, the Court finds the parties' briefing sufficient for determination of this matter and oral argument unnecessary, and accordingly deny Plaintiff's request for oral argument.

STATEMENT OF MATERIAL FACTS

In September of 1996, Congress passed certain amendments (the "Lautenberg Amendment") to the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., adding a firearms disability for "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence." *See* 18 U.S.C. § 922(g)(9). Unlike every other federal firearms disability under § 922(g), the Lautenberg Amendment applies to law enforcement officers, for Congress specifically excluded domestic violence misdemeanants from the general exemption for federal and state agencies from § 922(g) firearms disabilities. *See* 18 U.S.C. § 925(a)(1).

Plaintiff, Jerald Gillespie ("Gillespie"), brought this suit against Defendants, the City of Indianapolis (the "City"), the City of Indianapolis Police Department and Michael H. Zunk, Chief of Police, challenging the constitutionality of the Lautenberg Amendment. *See* Compl.

The United States has intervened in this action pursuant to 28 U.S.C. § 2403(a). Gillespie is a police officer employed by the Indianapolis Police Department and has been a full-time law enforcement officer since 1971. *See* Compl. PP 5, 8. In October 1995, Gillespie pled guilty to a misdemeanor battery offense involving domestic violence against his ex-wife. *See* Compl. P 7; Defs. Exh. A. The Indianapolis Police Department proposes to terminate Gillespie based on application of the Lautenberg Amendment, which criminalizes possession of a firearm by domestic violence offenders; under Indianapolis Police Department policy, every police officer must be trained and equipped to use and possess a firearm. *See* Compl. PP 6, 25. Gillespie filed suit and moved for preliminary injunctive relief barring his termination of employment, and Defendants, as well as the United States as intervenor, moved to dismiss his complaint. We will first address Gillespie's motion to strike and the City's and the United States' motions to dismiss and then turn to Gillespie's motion for preliminary injunction.

STANDARD OF REVIEW

On a motion to dismiss pursuant to Rule 12(b)(6), we must determine whether the plaintiff's complaint states a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The Court must examine the sufficiency of the plaintiff's complaint, not the merits of his lawsuit. *See Triad Assocs. v. Chicago Housing Auth.*, 892 F.2d 583, 585 (7th Cir. 1989). "Accordingly, the motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Craigs, Inc. v. General Elec. Capital Corp.*, 12 F.3d

686, 688 (7th Cir. 1993) (citation omitted); *see also Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984); *Jones v. General Elec. Co.*, 87 F.3d 209, 211 (7th Cir. 1996). When reviewing a motion to dismiss, we accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165, 113 S. Ct. 1160, 1161, 122 L. Ed. 2d 517 (1993); *Dawson v. General Motors Corp.*, 977 F.2d 369, 373 (7th Cir. 1992).

DISCUSSION

Scope of the Government's Intervention

The United States, which is not a party to this action, moved the Court to allow the Government to intervene as a matter of right, pursuant to 28 U.S.C. § 2403(a), which provides:

> In any action, suit or proceeding in a court of the United States to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court- . . . shall permit the United States to intervene for presentation of evidence . . . and for argument on the question of constitutionality. The United States shall . . . have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(a). Gillespie objected to the United States' motion, requesting the Court to limit the scope of

the intervention. In an order dated April 17, 1998, we granted the United States' motion to intervene as a matter of right and reserved the issue regarding the permissible scope of the intervention until later. In addition to his objection to the United States' motion to intervene, Gillespie moves to strike the United States' motion to dismiss and its jurisdictional arguments on standing and ripeness on the same grounds.

Gillespie argues that the statutory language of § 2403(a) specifically circumscribes the matters that the United States as intervenor may argue, in particular asserting that the United States may not challenge Gillespie's standing to bring suit and ripeness. *See* Plaint. Resp. to Govt. Mot. Interv. at 3. The United States responds that § 2403(a) is silent regarding whether its rights as an intervenor include the right to raise jurisdictional challenges and contends that the Court should not prevent the United States from addressing jurisdictional defects because it is "well-settled" that courts "should not reach constitutional questions if their decision[s] can be reasonably avoided." *See* Govt. Resp./Mot. Br. at 6 (quoting *Evans v. Newton*, 382 U.S. 296, 315-316, 86 S. Ct. 486, 497, 15 L. Ed. 2d 373 (1966) (Harlan, J., dissenting); *see also Peters v. Hobby*, 349 U.S. 331, 338, 75 S. Ct. 790, 794, 99 L. Ed. 1129 (1955).

We have found no case law specifically addressing the issue of whether the United States as an intervenor under § 2403(a) may challenge the jurisdiction of the Court. The case law relied upon by Gillespie primarily asserts that the intervention is "limited" to presenting evidence and arguing constitutionality, parroting the

words of the statute without providing much interpretation. *See Yniguez v. State of Arizona*, 939 F.2d 727, 739-740 (9th Cir. 1991) (government intervenor only had "limited right," not a party as to appeal); *Vietnamese Fishermen's Assoc. v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 215 (S.D. Tex. 1982); *Smolowe v. Delendo Corp.*, 36 F. Supp. 790, 792 (S.D.N.Y. 1940). However, § 2403(a) also states that a government intervenor has "all the rights ofa party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." 18 U.S.C. § 2403(a). This language suggests to us that the United States may argue issues of standing and ripeness as well as file a motion to dismiss as proper exercises of its right to present its constitutional arguments fully.

In addition, we recognize our independent obligation to determine subject matter jurisdiction as to each case before us, regardless of the parties' arguments or waivers, pursuant to our responsibilities under Article III (*see* Charles Wright, Arthur Miller & Edward Cooper, Federal Practice and Procedure: Jurisdiction § 3522 at 69-72 (2d ed. 1984) (collecting cases); *United States v. Tribal Development Corp.*, 49 F.3d 1208, 1216 (7th Cir. 1994) (court's authority to act under Article III carries with it a corresponding duty to monitor its jurisdiction)), which obligation is more acute when addressing constitutional challenges (*see Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-542, 106 S. Ct. 1326, 1331 & 1334, 89 L. Ed. 2d 501 (1986)). This continuing, non-waivable requirement of subject matter jurisdiction is codified in Federal Rule of Civil Procedure 12(h)(3), which states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction

> of the subject matter, the court shall dismiss the action.

Fed. R. Civ. P. 12(h)(3).

In light of the right granted to government intervenors under § 2403(a) to present constitutional arguments and the Court's obligation to determine independently whether it has proper authority over the instant case, we will consider the United States' arguments as to standing and ripeness as well as its motion to dismiss. Even if the motion to dismiss is not a proper exercise of the United States' rights as an intervenor under § 2403(a), we construe the motion to dismiss as the United States' argument in support of the constitutionality of § 922(g). Accordingly, we overrule Gillespie's objection to the scope of the United States' intervention and deny Gillespie's motion to strike the United States' motion to dismiss and argument on standing.

Municipal Defendants

Gillespie named the City of Indianapolis, the City of Indianapolis Police Department and Michael H. Zunk, Chief of Police, as defendants to this action. *See* Compl. As noted by Defendants in their motion to dismiss, the Indianapolis Police Department is a municipal department not separately suable from the City and Gillespie's suing Defendant Zunk in his official capacity is merely another way to sue the City. *See* Defs. Mot. Br. at 2 (citing *Jones v. Bowman*, 694 F. Supp. 538, 544 (N.D. Ind. 1988); *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)). Thus, the only viable defendant to this action is the City. *See Jungels v. Pierce*, 825 F.2d 1127,

1129 (7th Cir. 1987). Accordingly, we grant Defendants' motion to dismiss Gillespie's complaint as to the Indianapolis Police Department and Michael Zunk.

Standing and Ripeness

The United States moves to dismiss Gillespie's complaint for lack of subject matter jurisdiction, asserting that Gillespie does not have standing to bring his claims and that his claims are not ripe for adjudication. *See* Govt. Mot. Br. at 8. The United States contends that (1) Gillespie has not established a genuine threat of criminal prosecution under § 922(g)(9), (2) pre-enforcement judicial review of criminal laws is disfavored, (3) Gillespie's injury is not imminent but rather highly speculative and (4) his potential termination from the Indianapolis police force is not fairly traceable to the Lautenberg Amendment. *See* Govt. Mot. Br. at 8-13.[1] In response to the Government's challenge to his standing, Gillespie maintains that his injury is derived from his imminent termination from employment as a police officer, not any threat

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[1] The City does not dispute Gillespie's standing to challenge § 922(g)(9), acknowledging that the adverse employment action taken against Gillespie creates an actual injury. *See* Defs. Mot. Br. at 6. Instead, the City argues that Gillespie does not have standing to challenge § 922(s)(2), which provision relates to the obligation of chief law enforcement officers to determine the eligibility of persons to purchase handguns. *See* Defs. Mot. Br. at 6-7. However, as § 922(s)(2) was invalidated in *Printz v. United States*, ___ U.S. ___, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), Gillespie cannot assert a claim as to this provision and accordingly we do not address the City's standing argument. *See Printz*, ___ U.S. ___, 117 S. Ct. at 2383-2384.

of federal criminal enforcement, and that the United States' pre-enforcement argument is misplaced. *See* Plaint. Resp. Br. at 3. Gillespie asserts further that the reasoning in similar cases where federal courts found standing to challenge the 1996 amendments to the Gun Control Act should apply, arguing that his injury is:

> fairly traceable to the federal enactment because "local and state law enforcement agencies do not have unfettered choices or legitimate discretion to flout a federal statute by hiring, or continuing to employ, officers whose possession of firearms is a crime."

Plaint. Resp. Br. at 3-4 (quoting *Fraternal Order of Police v. United States*, 981 F. Supp. 1, 3 (D.D.C. 1997)).

The Court's judicial power under Article III is limited to the adjudication of "cases" and "controversies":

> The constitutional limitations upon our jurisdiction under the "case or controversy" requirement of Article III are now well settled: At an irreducible minimum., Art. III requires a party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and that the injury "fairly can be traced to the challenged action" and is likely to be redressed by a favorable decision.

Lindley for Lindley v. Sullivan, 889 F.2d 124, 128 n.3 (7th Cir. 1989) (citations omitted). Thus, the first thing we must determine is whether Gillespie has suffered some actual or threatened injury. An "injury in fact" consists of "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent,

not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

In his complaint, Gillespie alleges that "Defendants propose to terminate Plaintiff on April 15, 1998 based on their application of the 1996 Gun Control Act amendments." Compl. P 6.[2] Gillespie asserts further that he "has been subjected to altered conditions of employment as well as job qualification criteria as a result of the enforcement of the GCA amendments" (Compl. P 26) and that he:

> has been directly and negatively impacted by the application of the GCA amendments since December 30, 1997 when he was informed that defendant Zunk had determined that Plaintiff "should be discharged from the Indianapolis Police Department."

Compl. P 58. The City concedes that Michael Zunk recommended that Gillespie be terminated, at which point the decision was referred to the Merit Board for a de novo administrative hearing, and that Gillespie has been suspended without pay pending the decision of the Merit Board. *See* Defs. Mot. Br. at 4. We find that these facts support a finding that Gillespie's injury is sufficiently concrete and imminent for purposes of standing.

In addition, although the United States contends that the likelihood of Gillespie's final termination is "highly speculative" (*see* Govt. Mot. Br. at 11), we determine that

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[2] As a part of the pretrial proceedings in this litigation, a postponement of this deadline was agreed to by the parties pending our ruling on the pending motions.

the outcome is in fact highly predictable, for we recognize that a firearms disability operates as virtually a total bar to employment as a police officer. Specifically, we understand that the Indianapolis Police Department requires all police officers to qualify for firearms proficiency and, as a logical extension, firearms use. *See* Plaint. Prelim. Inj. Br., Attach. 1. Further, we agree with the district court in the *Fraternal Order of Police* decision that state and local police departments have no discretion to disregard a federal criminal statute, and thus we find that Gillespie is likely to be terminated as a city police officer, if this statute is applied as to him. *See Fraternal Order of Police*, 981 F. Supp. at 3.

The Indianapolis Police Department's lack of authority to ignore federal law in hiring police officers also supports our finding that Gillespie's injury is "fairly traceable" to the Lautenberg Amendment. In order to satisfy standing requirements, Gillespie's injury must be "fairly traceable" to the Lautenberg Amendment and "not an injury that results from the independent action of some third party. . . . " *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976). The United States argues that the Lautenberg Amendment does not set the qualifications for local and state police officers but only proscribes firearms possession. *See* Govt. Mot. Br. at 12. The United States contends that state and local police departments, including the Indianapolis Police Department, "remain free to determine what qualifications their law enforcement officers must possess." *See* Govt. Mot. Br. at 12. While the United States' contention may be true, it is not dispositive on the issue of whether the injury here is

"fairly traceable" to the statute. Indeed, the City concedes that Gillespie would be fired based solely upon the firearms restriction set forth in the Lautenberg Amendment. *See* Defs. Mot. Br. at 4. Thus, we find that any decision by the Indianapolis Police Department to fire Gillespie, while not mandated by § 922(g)(9), nevertheless stems from the federal statute and not the exercise of independent discretion.

We also find that Gillespie's injury is likely to be remedied by a favorable decision in this case, as the City seeks to fire him based solely on the application of § 922(g)(9), and without such disability the City would likely maintain his employment. Therefore, because we find that Gillespie has established sufficiently that he has an "injury-in-fact," that his injury is "fairly traceable" to the Lautenberg Amendment and that a decision holding the amendment unconstitutional likely would prevent Gillespie's termination, we hold that Gillespie has standing to bring this constitutional challenge to the Lautenberg Amendment.

The United States also challenges the ripeness of Gillespie's case for adjudication, asserting that "there are many uncertainties and contingencies which prevent plaintiff's case from presenting a ripe controversy." Govt. Mot. Br. at 14. "Ripeness is a doctrine which courts use to enforce prudential limitations upon their jurisdiction." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983). The Court must consider the following factors in assessing whether a case is ripe for judicial review: "the fitness of the issues for judicial decision and

the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967); *Peick*, 724 F.2d at 1261.

The United States contends that Gillespie's case is not ripe for adjudication because there has been no final decision as to Gillespie's employment status, arguing specifically that the police department has not determined whether the Lautenberg Amendment applies to Gillespie. *See* Govt. Mot. Br. at 15. Despite the United States' arguments, we find that this case is fit for judicial review because the issues presented involve purely legal questions – a facial constitutional attack upon the validity of a federal statute – and "would not be clarified by any further administrative proceedings or any other factual development." *See Triple G Landfills v. Board of Comm'rs*, 977 F.2d 287, 289 (1992).

In his complaint, Gillespie admits that he was convicted of a Class A misdemeanor for battery (*see* Compl. P 7) and does not appear to dispute that the Lautenberg Amendment applies to him.[3] In addition, the United

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[3] The United States mistakenly asserts that Gillespie disputes the amendment's application as to him, arguing that Gillespie contends he did not commit a misdemeanor crime of domestic violence, citing P 7 of the Complaint. *See* Govt. Mot. Br. at 14-15. However, in the cited paragraph, Gillespie states, "Plaintiff pled guilty in October 1995 to a Class A Misdemeanor which is not a domestic violence offense under state law." Compl. P 7. One of Gillespie's claims is that Congress improperly invaded the State of Indiana's right to determine the substantive definition of domestic violence and the punishments meted out for such offense (*see* Plaint. Prelim. Inj. Br. at 9), and the cited paragraph merely serves to assert and

States filed with the Court the order of conviction for Gillespie's misdemeanor offense in 1995, and the facts set forth in the order show that Gillespie pled guilty to a Class A misdemeanor battery against his ex-wife, Margaret Gillespie, which offense falls squarely within the definition of "misdemeanor crime of domestic violence" under § 922(g)(9).[4] *See* Govt. Mot. Br., Exh. A. Thus, there is no factual dispute that § 922(g)(9) operates as a firearms disability for Gillespie. Furthermore, although Gillespie has not been terminated finally by decision of the Merit Board, the Merit Board's decision will not impact the issues in dispute here – the constitutional validity of the Lautenberg Amendment – for no further factual development is needed for the Court to address Gillespie's claims. The hardship to Gillespie of delaying judicial review also weighs in favor of a finding of the ripeness as to the dispute, for he will be fired from the police force on the basis of the firearms disability. We hold as well that "there is no countervailing benefit –

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preserve these arguments. The United States presents no other evidence that Gillespie disputes the amendment's application.

[4] Section 921(a)(33)(A), which defines "misdemeanor crime of domestic violence" for purposes of § 922(g)(9), provides in relevant part:

> The term "misdemeanor crime of domestic violence" means an offense that –
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim. . . .

either to the judicial process or the public interest – that would attend such a postponement." *Triple G*, 977 F.2d at 290. Thus, for the reasons ascribed above, we find that the matter is ripe for review, and we will address now the merits of Gillespie's claims.

Count I: Tenth Amendment Challenge

Gillespie argues in Count I of his complaint that Congress' enactment of § 922(g)(9) and the other provisions of the Lautenberg Amendment invades state sovereignty in violation of the Tenth Amendment. *See* Compl. PP 59-83. Gillespie contends that the Lautenberg Amendment violates the principles outlined in Supreme Court cases such as *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) and *Printz v. United States*, ___ U.S. ___, 117 S. Ct. 2365 (1997) by (1) effectively supplanting state criminal law by defining the crime of domestic violence and establishing substantive penalties for such offense, (2) effectively supplanting state civil law by dictating qualifications of state and local law enforcement officials and (3) "imposing a duty on States to serve as 'implements of regulation.' " *See* Plaint. Prelim. Inj. Br. at 9-11, 16.

In response to Gillespie's assertion that the Lautenberg Amendment usurps the states' legislative power in the area of criminal law, the City cites *United States v. Westbrook*, 125 F.3d 996, 1010 (7th Cir. 1997), in which the Seventh Circuit addressed a Tenth Amendment challenge to federal crack cocaine laws. The criminal defendant, Westbrook, argued that such federal regulation invaded the states' traditional police powers. The Court upheld

the statute, stating, "Congress may regulate conduct that a state may also regulate." *See also United States v. Miller*, 307 U.S. 174, 178, 59 S. Ct. 816, 818, 83 L. Ed. 1206 (1939) (holding that argument that federal tax or narcotics regulation usurps states' police power is "plainly untenable").

In any event, we find that the statute at issue here does not create or amend state law, but rather enacts a new federal law, for states remain free to define and punish domestic violence crimes as they wish; however, the federal government imposes a federal firearms disability in addition to any action taken or not taken by the states. The definition of domestic violence within the Gun Control Act of 1968 applies only to that Act and any other federal statutes choosing to incorporate it, and the only substantive "punishment" added to the state offense is the federal firearms disability, which does not affect the states' sentencing decisions as to the domestic violence offense. Thus, we find Gillespie'sargument that the Lautenberg Amendment is "compelled state legislation" unpersuasive.

Similarly, we find that the statute does not speak to the qualifications of state officials because the statute regulates only private behavior. While it is true that, on the basis of the federal firearms disability imposed under § 922(g)(9), state and local law enforcement agencies are unlikely to continue employing domestic violence offenders or hire such persons in the future, these agencies are not "compelled" to change their employment qualifications by the statute. Such agencies may reassign officers to different divisions or "desk jobs," create special non-firearm units that use other weapons like nightsticks or remain unarmed, or even change the firearms

requirement for on-duty officers. Despite the fact that such agencies are most likely to discontinue the employment of domestic violence offenders rather than adjust the firearms requirement or accommodate those affected by the new disability, such outcome is not mandated by the statute, and the ancillary effect of the firearms disability on the employment of state and local law enforcement officers does not violate state sovereignty under the Tenth Amendment.

We will consider next Gillespie's claim that the Lautenberg Amendment forces the states to administer and enforce a federal regulatory program. The Seventh Circuit in *United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1997) rejected a similar Tenth Amendment challenge to another federal firearms disability under the Gun Control Act of 1968, § 922(o), which statute prohibits possession of machine guns. The Kenney court asserted that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Kenney*, 91 F.3d at 891 (quoting *New York*, 505 U.S. at 156-157, 112 S. Ct. at 2417-2418). The Seventh Circuit recognized that the Tenth Amendment acts as a restraint upon Congress' authority, limiting the federal government to its enumerated powers as well as restricting the manner in which Congress exercises those powers, concluding:

> Because § 922(o) was a proper exercise of Congress's enumerated authority under the Commerce Clause, and because it does not compel, let alone commandeer, the states to do anything, the statute does not violate the Tenth Amendment.

Kinney, 91 F.3d at 891. Thus, in order to survive a Tenth Amendment challenge, § 922(g)(9) must fall within one of Congress' enumerated powers and the manner in which Congress enacts the statute must not invade state sovereignty. As discussed below, we find that the firearms disability in § 922(g)(9) is a proper exercise of Congress' Commerce Clause power, so we need only determine whether the manner in which Congress has created the firearm disability "compels the states to do anything."

The City and the United States both contend that § 922(g)(9) is a constitutional exercise of congressional power that does not violate the Tenth Amendment. The United States argues that Gillespie's reliance upon *New York* and *Printz* is misplaced, for in those decisions, the Supreme Court invalidated statutes that required action on the part of the states, while the Lautenberg Amendment "places no requirement on States or state officials." *See* Govt. Mot. Br. at 19-20 (quoting *Fraternal Order of Police*, 981 F. Supp. at 6). In *New York*, the challenged statute provided that the states' failure to regulate the disposal of radioactive waste according to congressional standards required the states to take title to the waste and assume responsibility for its disposal. As the burden of regulation fell directly upon the states, the Court found that the statute constituted an impermissible coercion of state governments. *See New York*, 505 U.S. at 174-177, 112 S. Ct. at 2427-2429.

In *Printz*, the Court struck down certain sections of § 922(s) of the Gun Control Act of 1968 because the statute forced the states to take action by commanding the chief law enforcement officers of state and local law enforcement agencies to make "reasonable efforts" to

conduct background checks on prospective gun buyers. *See Printz*, ___ U.S. ___, 117 S. Ct. at 2383-2384. The Court held that Congress cannot force state officers to administer or enforce federal law. *See Printz*, ___ U.S. ___, 117 S. Ct. at 2381. In contrast, we find that § 922(g)(9) does not force the states to take any such action. Unlike the statutes struck down in *New York* and *Printz*, § 922(g)(9) regulates the behavior of private individuals, not states, for individuals will be prosecuted for violation of the statute and there is no federal mandate for states to assist in regulation and enforcement.[5]

Gillespie also raises an intriguing, albeit unsupported, argument regarding the exclusion of misdemeanor domestic violence offenders from the general exemption for law enforcement and other federal and state agents from federal firearms disabilities under the Gun Control Act of 1968. *See* 18 U.S.C. § 925(a)(1). Gillespie contends that Congress previously provided the exemption for state and local police officers in recognition of state sovereignty, particularly, the states' police powers, and that Congress' subsequent denial of this exemption as to § 922(g)(9) constitutes an impermissible invasion of the states' policepower and thus violates the Tenth Amendment. *See* Plaint. Resp. Br. at 12. Gillespie provides no case law, legislative history or other support

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[5] Gillespie argues that § 922(g)(9) does not regulate private behavior but rather directs the actions of state officials in "prohibiting them from discharging their official duties upon threat of punishment." Plaint. Resp. Br. at 8. However, the statute at issue does not regulate such law enforcement personnel as state officials, but only as private citizens.

for this bare contention, and the Court has been unable to locate any authority on point.

We recognize some appeal in this argument, understanding that Congress does not create exemptions to its laws arbitrarily and without good reason and perhaps only acts in such a way when it feels forced to, whether out of political pressure or constitutional dictates. Nevertheless, we cannot create legislative intent out of whole cloth, and while the exemption for state and federal agencies likely stems from more than mere deference to state interests, we are not free to speculate as to congressional intent. In any event, legislative intent would not be controlling, as Congress' belief regarding the constitutional limits of its own powers is not dispositive as to those limits. Having already determined that § 922(g)(9) does not unconstitutionally invade state sovereignty as protected by the Tenth Amendment, we reject Gillespie's argument. Therefore, because we find that the statute does not compel the states to administer or enforce a federal regulatory program, we grant the City's and the United States' motions to dismiss Gillespie's claims under the Tenth Amendment.

Count II: Commerce Clause Challenge

Gillespie asserts that the Lautenberg Amendment exceeds Congress' power to regulate interstate commerce under the Commerce Clause. *See* Plaint. Prelim. Inj. Br. at 21. The Commerce Clause provides in relevant part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States. . . . " U.S. Const. art. I, § 8, cl. 3. Gillespie contends that the

Lautenberg Amendment does not contain a sufficient connection to interstate commerce, particularly as applied to a police officer like Gillespie, who has possessed firearms intrastate in the public interest without incident for over 25 years, according to Gillespie.[6] *See* Plaint. Prelim. Inj. Br. at 24. Gillespie relies upon *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626, (1995), in which the Supreme Court held unconstitutional the "Gun Control Free School Zone Act, " 18 U.S.C. § 922(q). In *Lopez*, the Court held that mere possession of a firearm as prohibited in § 922(q), without an express jurisdictional nexus to interstate commerce, is not an economic activity that substantially affects interstate commerce. *See Lopez*, 514 U.S. at 561, 567-568, 115 S. Ct. 1631, 1634.

The City and the United States both move to dismiss Gillespie's Commerce Clause claim, asserting that § 922(g)(9) contains an express jurisdictional requirement that § 922(q) lacked, which requires that prosecution to prove that the firearm in question was shipped or transported "in interstate or foreign commerce" or was prossed "in or affecting commerce," (18 U.S.C. § 922(g)). *See*

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[6] We note that any argument that the statute is unconstitutional "as applied" to Gillespie exceeds the Court's authority. Such a claim is not ripe for review because it requires further factual development not alleged in Gillespie's complaint, such as the origin of Gillespie's service firearm and whether it has moved in interstate commerce. *See United States v. Lewis*, 100 F.3d 49, 51-52 (7th Cir. 1996). Thus, we find that the facts relevant to such inquiry are not sufficiently concrete for judicial review and any claim that the statute is unconstitutional as applied is hereby dismissed.

Defs. Mot. Br. at 8-9; Govt. Mot. Br. at 17-18. As the City and the United States correctly attest, Section 922(g)'s jurisdictional nexus has been held sufficient to defeat a Commerce Clause challenge by every federal circuit court to decide the issue, including the Seventh Circuit. *See United States v. Lewis*, 100 F.3d 49, 51-53 (7th Cir. 1996); *United States v. Bradford*, 78 F.3d 1216, 1222-1223 (7th Cir. 1996); *United States v. Lee*, 72 F.3d 55, 58-59 (7th Cir. 1995).[7]

In light of the overwhelming weight of precedent, we find that § 922(g)(9) is a proper exercise of Congress' power under the Commerce Clause, and we grant the City's and the United States' motions to dismiss as to Count II of Gillespie's complaint.

Count III: Fifth Amendment Challenge – Equal Protection

In Count III of his complaint, Gillespie asserts that § 922(g)(9) violates the Fifth Amendment'sequal protection guarantee.[8] *See* Compl. PP 99-114; Plaint. Prelim. Inj.

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[7] *See also United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996); *United States v. Barry, Barry*, 98 F.3d 373, 378 (8th Cir. 1996); *United States v. Garcia*, 94 F.3d 57, 64 (2d Cir. 1996); *United States v. Nguyen*, 88 F.3d 812, 820-821 (9th Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996); *United States v. Gateward*, 84 F.3d 670, 672 (3rd Cir. 1996); *United States v. Turner*, 77 F.3d 887, 889 (6th Cir. 1996); *United States v. McAllister*, 77 F.3d 387, 389 (11th Cir. 1996); *United States v. Bennett*, 75 F.3d 40, 48-49 (1st Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1996).

[8] Gillespie asserts also that the Lautenberg Amendment violates the Equal Protection Clause of the Fourteenth Amendment, but as this clause applies only to state action, not

Br. at 27. In order to survive an equal protection challenge, a statutory classification must pass "rational basis" review unless it invades a fundamental constitutional right or is based upon "suspect" criteria, such as race. *See Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 2691, 65 L. Ed. 2d 784 (1980); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566, 49 L. Ed. 2d 520 (1976). Gillespie concedes that law enforcement officers are not a suspect class (*see* Plaint. Prelim. Inj. Br. at 28) but contends that the Lautenberg Amendment impinges upon his fundamental right to bear arms under the Second Amendment as well as his interest in his employment with the Indianapolis Police Department (*see* Plaint. Prelim. Inj. Br. at 28-29). The City and the United States move to dismiss Gillespie's equal protection claim, asserting that § 922(g)(9) does not infringe any fundamental rights and is rationally related to the legitimate government purpose of keeping firearms away from potentially dangerous persons, specifically, those convicted of domestic violence offenses. *See* Defs. Mot. Br. at 19; Govt. Mot. Br. at 26.

If a fundamental right is impinged by an act of Congress, the enactment must be narrowly tailored to serve a compelling governmental interest. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993); *Plyler v. Doe*, 457 U.S. 202, 216-217, 102 S. Ct. 2382, 2394-2395, 72 L. Ed. 2d 786 (1982). However, if no fundamental right is implicated, a statutory classification is

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federal, we will address only Gillespie's Fifth Amendment claims.

presumed valid and will be upheld provided it is "rationally related to achievement of a legitimate governmental interest" (*Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657, 101 S. Ct. 2070, 2077, 68 L. Ed. 2d 514 (1981)), such that there is a "reasonably conceivable state of facts that could provide a rational basis for the classification" (*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993)).

Gillespie contends that the Lautenberg Amendment "create[s] a clear deprivation of a fundamental right to bear arms." Plaint. Prelim. Inj. Br. at 29. As the enactments impinge a fundamental right, Gillespie argues, they should be scrutinized under a compelling governmental interest standard. *See* Plaint. Prelim. Inj. Br. at 29. The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

Relying upon such cases as *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939) and *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), the City contends that the Second Amendment is not a fundamental right for equal protection purposes. *See* Defs. Mot. Br. at 17; *see also* Govt. Mot. Br. at 24-25 (arguing that right to bear arms is not a fundamental right). In *Miller*, the Supreme Court's most recent interpretation of the Second Amendment, the Court reviewed a district court decision invalidating part of the National Firearms Act of 1934 on Second Amendment grounds.

The plaintiff, Miller, was indicted for transporting a sawed-off shotgun that had not been registered pursuant to the Act. The Court reversed the lower court, holding:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Miller, 307 U.S. at 178, 59 S. Ct. at 818.

The Supreme Court in *Lewis* rejected an equal protection challenge to federal legislation forbidding felons from possessing firearms similar to Gillespie's claim, asserting, "These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Lewis*, 445 U.S. at 65 n.8, 100 S. Ct. at 921 n.8 (citing *Miller*). The Lewis Court continued:

> This Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.

Lewis, 445 U.S. at 66, 100 S. Ct. at 921. On the weight of the *Miller* and *Lewis* decisions, we conclude that the right to bear arms guaranteed by the Second Amendment is

not a fundamental right for equal protection purposes.[9] *See also Sklar v. Byrne*, 727 F.2d 633, 637 (7th Cir. 1984) ("the second amendment does not require us to apply the compelling governmental interest standard").

Gillespie also contends that strict scrutiny is required because the statute "essentially deprives law enforcement personnel of their property interest in their employment where receipt and possession of a government issued firearm is usually mandatory," contending that such employment interest is a fundamental right. Plaint. Prelim. Inj. Br. at 29. However, the Supreme Court held that "there is no fundamental right to government employment for purposes of the Equal Protection Clause." *United Bldg. and Constr. Trades Council of Camden v. Mayor of Camden*, 465 U.S. 208, 219, 104 S. Ct. 1020, 1028, 79 L. Ed. 2d 249 (1984) (citing *Massachusetts Bd. of Retirement*, 427 U.S. at 313, 96 S. Ct. at 2566); *see also Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273, 99 S. Ct. 2282, 2293, 60 L. Ed. 2d 870 (1979) ("public employment is not a constitutional right"); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161-1162, 25 L. Ed. 2d 491 (1970) (rational basis standard applies to "legislation restricting the availability of employment opportunities"). Thus, we conclude that Gillespie has no fundamental right to his employment as an Indianapolis police officer. Having

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[9] Even if we determined that the right to bear arms is a fundamental right for equal protection purposes, *see* the Court's analysis of § 922(g)(9) under strict scrutiny in the discussion of Gillespie's Second Amendment claim, *infra*.

found that there is no fundamental right to possess firearms or to public employment, we will examine Gillespie's equal protection claims under a "rational basis" standard.

First, Gillespie maintains that the statute irrationally singles out offenders convicted of domestic violence misdemeanors "out of the pantheon of violent misdemeanors" for a firearms disability, giving preferential treatment to every other type of misdemeanant, including those with multiple convictions. Plaint. Prelim. Inj. Br. at 30. As the City and the United States contend, however, the Court is concerned only with the basic rationality of the classification, not the type of differential treatment Gillespie seeks to challenge, for "an individual's right to equal protection of the laws . . . does not deny [Congress] . . . the power to treat different classes of persons in different ways." *NAGE v. Barrett*, 968 F. Supp. 1564, 1573 (N.D. Ga. 1997) (quoting *Johnson v. Robison*, 415 U.S. 361, 374, 94 S. Ct. 1160, 1169, 39 L. Ed. 2d 389 (1974)).

Examining the legislative history available, it is clear that Congress was concerned with the fact that many victims of domestic violence are murdered by their attackers and sought to remove firearms from a particular class of individuals who have already been convicted of a domestic violence offense. *See* 142 Cong. Rec. S11,227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg) ("the presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder"). Congress determined that an individual "who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk and should be prohibited from possessing firearms." 142

Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg); *see also* 142 Cong. Rec. S10,379 (daily ed. Sept. 12. 1996) (statement of Sen. Murray) ("In the face of the reality of domestic violence and the role guns play in homicides in such situations, the Senate cannot allow convicted abusers to have guns," citing statistics).

We find that preventing domestic violence misdemeanants from possessing a firearm is reasonably related to the legitimate government purposes of keeping firearms out of the hands of potentially dangerous or irresponsible persons and protecting victims of domestic violence from being murdered by their attackers. In addition, we note that the fact that Congress has selected only one class of violent misdemeanants does not serve to invalidate the statute, as "the legislature must be allowed some leeway to approach a perceived problem incrementally." *FCC v. Beach Communications*, 508 U.S. at 316, 113 S. Ct. at 2102.

Second, Gillespie argues that § 922(g)(9) violates his equal protection rights because the statute has a disproportionate impact on law enforcement officials. *See* Plaint. Prelim. Inj. Br. at 31. Gillespie does not allege that the statute singles out police officers, and we note that the statute is facially neutral. While we recognize that the ultimate effect of the statute on Gillespie and other law enforcement officials who have misdemeanor domestic violence convictions likely will be the loss of their employment because such positions generally mandate possession of a firearm, the disparate impact of a law that is neutral on its face may invalidate the statute only if the disparate impact can be traced to a discriminatory purpose. *See e.g., Personnel Administrator of Massachusetts v.*

Feeney, 442 U.S. 256, 272, 99 S. Ct. 2282, 2293, 60 L. Ed. 2d 870 (1979). As the City and the United States argue, Gillespie has not alleged or shown any discriminatory purpose (*see* Defs. Mot. Br. at 21-22; Govt. Mot. Br. at 26), and the legislative history does not reveal any evidence that Congress sought to discriminate against law enforcement personnel. *See also NAGE*, 968 F. Supp. at 1575 (finding no discriminatory purpose in the enactment of § 922(g)(9)).[10] Thus, we grant the City's and the United States' motions to dismiss Gillespie's Fifth Amendment equal protection claim in Count III of his complaint.

Count III: Fifth Amendment Challenge – Due Process

The City and the United States also move to dismiss Gillespie's substantive and procedural due process claims as set forth in Count III of his complaint (*see* Compl. PP 99-114). *See* Defs. Mot. Br. at 22-23; Govt. Mot. Br. at 27-28. The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In support of his due process claims, Gillespie asserts:

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[10] Gillespie contends further that the "reliance interest" in the extensive training and experience of officers like Gillespie warrants at least only prospective application of the firearms disability. *See* Plaint. Prelim. Inj. Br. at 31-32. This argument is not relevant to an equal protection inquiry and not within the proper limits of the judicial sphere, but rather belongs in the legislative arena. We note that there are currently bills pending in both the Senate and the House of Representatives proposing prospective application of § 922(g)(9). *See* S. 262, 105th Cong. (1997); H.R. 26, 105th Cong. (1997).

> The right to bear arms and the right to a reasonable expectancy interest in continued employment or status in the community secured by existing state and federal law cannot be removed arbitrarily.

Plaint. Prelim. Inj. Br. at 32. However, as we noted previously in our discussion of Gillespie's equal protection claims, these are not fundamental rights, and thus Gillespie's substantive due process claim must be analyzed under the rational basis test. *See TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995). Because we have already determined that the Lautenberg Amendment satisfies rational basis review (*see* equal protection discussion, supra), Gillespie's substantive due process claim is foreclosed.

Turning to Gillespie's procedural due process claim, the City correctly contends that "Gillespie does not articulate how the GCA amendments violate procedural due process." Defs. Mot. Br. at 22. To the extent that Gillespie challenges the legislative process in enacting § 922(g)(9), his claim must fail, for:

> when the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process.

Brown v. Retirement Comm., 797 F.2d 521, 527 (7th Cir. 1986) (quoting J. Nowak, R. Rotunda & J. Young, Constitutional Law 556 (1983)). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433, 102 S. Ct. 1148, 1156, 71 L. Ed. 2d 265 (1982) ("the legislative determination provides all the process that is due"); *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986). If Gillespie were to

challenge the pre- and post-termination procedures of the Indianapolis Police Department, which he does not argue in his complaint or briefs, we would find such a claim premature, for he has not completed the administrative review process provided by the Department, and the Merit Board de novo review process, as described in the parties' briefing (*see* Defs. Mot. Br. at 4), appears to provide sufficient notice and opportunity for a hearing. In any event, Gillespie does not specify any particular failings in the review process. Having found no merit in Gillespie's due process challenges, we grant the City's and the United States' motions to dismiss Gillespie's substantive and procedural due process claims in Count III.

Count III: Bill of Attainder and Ex Post Facto Challenges

Gillespie also asserts in Count III of his complaint that § 922(g)(9) violates the Bill of Attainder and Ex Post Facto Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed"). Gillespie contends that the statute creates retroactive criminal penalties and removes a previous law enforcement class exemption. *See* Compl. PP 104, 110, 111. Both the City and the United States move to dismiss Gillespie's claims as to alleged violation of the bill of attainder and ex post facto clause. *See* Defs. Mot. Br. at 23-27; Govt. Mot. Br. at 30-34. A bill of attainder is:

> a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial.

Selective Service Sys. v. Minnesota Public Interest Research Group, 468 U.S. 841, 846-847, 104 S. Ct. 3348, 3352, 82 L. Ed. 2d 632 (1984). An ex post facto law:

> must be retrospective, that is – it must apply to events occurring before its enactment – and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime.

Lynce v. Mathis, 519 U.S. 433, ___, 117 S. Ct. 891, 896, 137 L. Ed. 2d 63 (1997) (citations omitted).

Gillespie did not present arguments regarding his bill of attainder and ex post facto claims in his motion for preliminary injunction and, more importantly, failed to respond to the City's and the United States' motions to dismiss these claims in his response brief, arguing only his Commerce Clause, Tenth Amendment, Fifth Amendment and Contract Clause claims. *See* Plaint. Prelim. Inj. Br.; Plaint. Resp. Br. Thus, we hold that Gillespie has abandoned his ex post facto and bill of attainder claims (*see Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996) (plaintiff abandoned claim after failing to respond to argument in motion for summary judgment)), undoubtedly because the case law and legislative history argue so clearly against Gillespie's position.[11]

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[11] Even if we were to address the merits of Gillespie's ex post facto and bill of attainder challenges, we would find his claims unavailing, for the Lautenberg Amendment (1) only criminalizes conduct occurring after the effective date of the statute (possession of a firearm by domestic violence offender), (2) was not enacted for punitive purposes and (3) is reasonably related to preventing crime and protecting the victims of domestic violence. *See United States v. Brady*, 26 F.3d 282, 291 (2d

Accordingly, we grant the City's and the United States' motions to dismiss as to these claims in Count III.

Count IV: Second Amendment Challenge

In Count IV of his complaint, Gillespie maintains that the Lautenberg Amendment violates his Second Amendment right to bear arms, both as an individual and in his capacity as a police officer. *See* Compl. PP 115-129. In his preliminary injunction brief, Gillespie concedes that the Second Amendment "has not yet been held to contain a personal right to keep and bear arms." *See* Plaint. Prelim. Inj. Br. at 33; *see also* Plaint. Resp. Br. at 6 ("Officer Gillespie is not challenging a restriction on his private behavior"). Instead of pursuing his private right to carry a firearm, Gillespie seeks to vindicate his individual right to possess a gun as a law enforcement officer of the State of Indiana, in other words, as someone whose possession

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Cir. 1994) (ex post facto clause not violated when statute punishes crime committed after effective date); *United States v. Allen*, 886 F.2d 143, 146 (8th Cir. 1989) ("So long as the actual crime for which a defendant is being sentenced occurred after the effective date of the new statute, there is no ex post facto violation"). *See also De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960) (bill of attainder only if legislative purpose is punitive; purpose of statute was to regulate waterfront, not punish ex-felons); *Huddleston v. United States*, 415 U.S. 814, 824, 94 S. Ct. 1262, 1268, 39 L. Ed. 2d 782 (1968) (purpose of federal gun control is to "curb crime" by preventing possession by youths, criminals and incompetents); 142 Cong. Rec. S11,872-S11,886 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (purpose of Lautenberg Amendment is to protect victims of domestic violence).

relates to a state militia, or in the alternative, the collective right of the state to preserve and regulate the militia.

Here Plaintiff's contention is that the 1996 GCA Amendments, at least so far as they purport to regulate purely intrastate possession of a firearm possessed in the public interest and according to the proper exercise of the police power of the state, run afoul of the Second Amendment.

Plaint. Prelim. Inj. Br. at 34. Gillespie does not appear to dispute application of the *Miller* language, which requires "some reasonable relationship to the preservation or efficiency of a well regulated militia" (*see Miller*, 307 U.S. at 178, 59 S. Ct. at 818) but contends that his role in the Indianapolis Police Department in fact bears a strong relation to a militia. Gillespie quotes Miller, which stated that a sawed-off shotgun was not shown to be "ordinary military equipment" or a weapon whose "use could contribute to the common defense" (*see* Plaint. Prelim. Inj. Br. at 34) (quoting *Miller*, 307 U.S. at 178, 59 S. Ct. at 818) and argues that his police firearm is just such a weapon:

> The firearm carried in the public interest by a law enforcement officer is a firearm that is de facto in the State Militia. Plaintiff's service firearm is not simply a private firearm. . . .

Plaint. Prelim. Inj. Br. at 34-35 (citations omitted). Gillespie cites the fact that he is subject to the Indiana Governor's call, and as a police officer he is also imbued with certain police powers of the state. *See* Plaint. Prelim. Inj. Br. at 34 (citing Ind. Code § 10-1-1-10).

The City and the United States maintain that Gillespie's claim must fail, contending that there is no personal right that can be vindicated under the Second Amendment, but only a collective right belonging to the states. *See* Defs. Mot. Br. at 16-17; Govt. Mot. Br. at 22-23. They direct the Court to several federal circuit court decisions that hold that the Second Amendment guarantees only a collective right to the states. *See Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *see also Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943). We note that the Supreme Court has not had occasion to opine specifically on this issue. *See Printz*, ___ U.S. ___, 117 S. Ct. at 2386 (Thomas, J., concurring). While we believe the existence of a collective rather than an individual right is far from settled, in observing the dictates of judicial restraint, we will not decide the question unless absolutely necessary.

We need not reach the issue of whether the right safeguarded by the Second Amendment is individual or collective in nature or what level of judicial review would be appropriate, because even giving the most generous construction to the Second Amendment, we find that Gillespie's claim fails. Even if the Court applies strict scrutiny, the most stringent standard of review for basic constitutional rights, we find that § 922(g)(9) survives. The doctrine of strict scrutiny teaches that a statute infringing a fundamental constitutional right will be invalidated unless it is "narrowly tailored to serve a compelling governmental interest." *See, e.g., Reno v.*

Flores, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993); *Plyler v. Doe*, 457 U.S. 202, 216-217, 102 S. Ct. 2382, 2394-2395, 72 L. Ed. 2d 786 (1982).

Applying strict scrutiny to the gun control statute at issue, we find that § 922(g)(9) survives Gillespie's challenge, for the law is narrowly tailored to serve Congress' compelling governmental interest in keeping deadly firearms away from persons reasonably adjudged by Congress to be dangerous or irresponsible, as well as preventing victims of domestic violence from being killed by their attackers with a firearm. The statute is narrowly tailored in that it applies only to persons who have been convicted previously in a court of law of a crime of domestic violence, and Congress cited many statistics linking the presence of firearms to the substantial number of deaths resulting from domestic violence disputes. *See, e.g.*, 142 Cong. Rec. S11,227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg) ("in households with a history of battery, the presence of a gun increases the likelihood that a woman will be killed threefold;" purpose of amendments is to protect domestic violence victims from further harm); 142 Cong. Rec. S10,377-01, S10,378 (daily ed. Sept. 12, 1996) (statement of Sen Lautenberg) ("two-thirds of domestic violence murders involve firearms"). Thus, even considering the facts and the law in a light most generous to Gillespie's claim, we find that the Lautenberg Amendment does not violate the Second Amendment and we grant the City's and the United States' motions to dismiss as to this claim.

Count V: Contract Clause Challenge

Gillespie claims in Count V of his complaint that the Lautenberg Amendment violates the proscription on the impairment of contracts, as set forth in Article I, § 10, cl. 1 of the Constitution: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " Gillespie contends that § 922(g)(9) is "compelled state legislation" that "operates to substantially impair Plaintiff's oath-based contractual obligations." *See* Plaint. Prelim. Inj. Br. at 36-38. The City and the United States both move to dismiss Gillespie's Contract Clause claim, asserting that (1) the Contract Clause applies on its face only to states, not the federal government and (2) the Lautenberg Amendment is not compelled state legislation. *See* Defs. Mot. Br. at 27-28; Govt. Mot. Br. at 29-30.

In assessing whether an impairment of contract violates the constitution, the Court must balance the individual's contractual rights against "the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21, 97 S. Ct. 1505, 1517, 52 L. Ed. 2d 92 (1977) (citations omitted). As the City and the United States correctly argue and as Gillespie concedes (*see* Plaint. Prelim. Inj. Br. at 36), however, the Contract Clause applies only to states; it does not operate as a restriction upon "actions of the National Government." *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 n.9, 104 S. Ct. 2709, 2719 n.9, 81 L. Ed. 2d 601 (1984). When a plaintiff invokes the Contract Clause against a federal statute, courts typically analyze the

statute under the Due Process Clause of the Fifth Amendment, assessing first whether "the statute alters constitutional rights or obligations" and second, whether the impairment is minimal or "of constitutional dimension." *See National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry.*, 470 U.S. 451, 472, 105 S. Ct. 1441, 1455, 84 L. Ed. 2d 432 (1985). Assuming for the sake of argument that the statute's interference with Gillespie's employment contract with the Indianapolis Police Department is, in fact, a substantial constitutional impairment, we must analyze the legislation under the Due Process Clause.

When the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.

National R.R., 470 U.S. at 472, 105 S. Ct. at 1455 (1985). However, we have already addressed and denied Gillespie's procedural due process claim, supra, and we necessarily find Gillespie's Contract Clause claim similarly unavailing. In addition, we addressed Gillespie's argument that the statute operates as "compelled state legislation" in our dismissal of his Tenth Amendment claim, supra. Therefore, we grant the City's and the United States' motions to dismiss Count V of Gillespie's complaint.

Count VI: Pendent State Law Claims

The City moves the Court to dismiss Gillespie's pendent state law claims under the Indiana Constitution, arguing that the Supremacy Clause defeats any claim Gillespie may assert under state law. *See* Defs. Mot. Br. at 28. Gillespie contends in his complaint that the Lautenberg Amendment violates the Indiana Constitution, which protects the right to bear arms and proscribes ex post facto laws and bills of attainder. *See* Compl. PP 142-148. However, Gillespie appears to have abandoned these claims, not having raised them in his motion for preliminary injunction and not responding to the City's motion to dismiss Gillespie's state law claims. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). Thus, we do not need to reach the merits of Gillespie's state law claims and we grant the City's motion to dismiss Count VI of the complaint.

Gillespie's Motion for Preliminary Injunction

We now turn to Gillespie's motion for preliminary injunction. Having granted the City's and the United States' motions to dismiss as to all of Gillespie's claims, we have disposed of the case and nothing remains to litigate at this time. Thus, it is unnecessary to address the merits of Gillespie's preliminary injunction motion, which we deny as moot.

CONCLUSION

Plaintiff Gillespie seeks preliminary injunctive relief, challenging the constitutionality of § 922(g)(9) in order to

prevent Defendants the City of Indianapolis, the Indianapolis Police Department and Police Chief Michael Zunk from firing him from his position as a City of Indianapolis police officer. Gillespie moves to strike the United States' motion to dismiss and arguments as to Gillespie's standing and the ripeness of his claims on the ground that such arguments are beyond the scope of the United States' intervention.

Defendants move to dismiss Gillespie's claims, asserting that (1) the Police Department and Michael Zunk are not proper defendants to this action; (2) the statute does not violate the Tenth Amendment because it does not compel the states to do anything; (3) § 922(g)(9) is a proper exercise of Congressional authority under the Commerce Clause; (4) the statute does not violate equal protection because it is rationally related to a legitimate governmental purpose; (5) the statute does not violate due process because it satisfies the rational basis test and Gillespie is being provided sufficient review of his termination decision; (6) § 922(g)(9) does not violate the bill of attainder and ex post facto clause because its purpose is not punitive and it criminalizes conduct occurring after enactment of the statute; (7) the statute does not violate the Second Amendment because there is no constitutional right to possess a firearm; (8) § 922(g)(9) does not violate the Contract Clause because the Contract Clause applies only to state legislation and (9) Gillespie's state law claims are foreclosed by the Supremacy Clause.

The United States similarly moves the Court to dismiss Gillespie's Tenth Amendment, Commerce Clause, equal protection, due process, bill of attainder/ex post facto clause, Second Amendment and Contract Clause

claims and also challenges Gillespie's standing and the ripeness of the present claims. In addition, the United States argues that the scope of its intervention is broad enough to encompass the arguments contained within its motion to dismiss, in order to allow the government to present a full discussion of the constitutionality of § 922(g)(9). For the reasons set forth above, we deny Gillespie's motion to strike the United States' motion to dismiss and its jurisdictional arguments on standing and ripeness, grant Defendants' motion to dismiss as to all of Gillespie's claims, grant the United States' motion to dismiss as to all of Gillespie's claims and deny as moot Gillespie's motion for preliminary injunction.

It is so ORDERED this 5th day of June 1998.

SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

JUDGMENT

In accordance with the Court's entry dated June 5, 1998, judgment is hereby entered in favor of Defendants, the City of Indianapolis, the City of Indianapolis Police Department and Michael H. Zunk and against Plaintiff, Jerald Gillespie. Each of the parties shall bear its own costs in this matter.

It is so ORDERED this 5th day of June 1998.

SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

18 USCS § 921 (1997)

§ 921. Definitions

(a) As used in this chapter [18 USCS §§ 921 et seq.] –

* * *

(32) The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that –

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for

purposes of this chapter [18 USCS §§ 921 et seq.], unless –

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii)A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USCS §§ 921 et seq.] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

* * *

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS
18 USCS § 922 (1999)

§ 922. Unlawful acts

* * *

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person –

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

* * *

(g) It shall be unlawful for any person –

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS
18 USCS § 925 (1999)

§ 925. Exceptions: Relief from disabilities

(a)(1) The provisions of this chapter [18 USCS §§ 921 et seq.], except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

* * *

UNITED STATES CONSTITUTION

ARTICLE 1

Section 8. **The Congress shall have power to** lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

* * *

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

ARTICLE SIX

* * *

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

AMENDMENT TWO

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

AMENDMENT TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[LOGO]

DIRECTOR

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

NOV. 26, 1996

OPEN LETTER TO ALL STATE AND LOCAL LAW ENFORCEMENT OFFICIALS

The purpose of this letter is to provide information to all State and local law enforcement agencies regarding one specific aspect of the recently enacted Omnibus Consolidated Appropriations Act of 1997 (the Act). One part of the Act amended the Gun Control Act of 1968 (GCA) to make it unlawful for any person convicted of a "misdemeanor crime of domestic violence" to ship, transport, possess, or receive firearms or ammunition. It also makes it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that the recipient has been convicted of such a misdemeanor. This new prohibition *does* apply to all law enforcement officers.

Act adds new firearms disability

As defined in the GCA, a "misdemeanor crime of domestic violence" means an offense that:

(1) is a misdemeanor under Federal or State law; and

(2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian

> of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person, similarly situated to a spouse, parent, or guardian of the victim.

The definition includes all misdemeanors that involve the use or attempted use of physical force (*e.g.*, simple assault, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor. for example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms or ammunition. Moreover, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date, September 30, 1996. As of the effective date of the new law, such a person may no longer possess a firearm or ammunition. However, with respect to all persons, a conviction would not be disabling if it has been expunged, set aside, pardoned, or the person has had his or her civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) *AND* the person is not otherwise prohibited from possessing firearms or ammunition.

New disability applies to law enforcement officers

In addition, the Act amended the GCA so that employees of government agencies convicted of qualifying misdemeanors would *not* be exempt from this new disability

with respect to their receipt or possession of firearms or ammunition. Thus, law enforcement officers and other government officials who have been convicted of a qualifying misdemeanor will not be able to lawfully possess or receive firearms or ammunition for any purpose, including performing their official duties. This disability applies to firearms and ammunition issued by government agencies, firearms and ammunition purchased by officials for use in performing their official duties, and personal firearms and ammunition possessed by such officials.

In view of this amendment's effect on law enforcement officers, your department may want to determine if any employee who is authorized to carry a firearm is subject to this disability and what appropriate action should be taken. Employees subject to this disability must immediately dispose of all firearms and ammunition in their possession. The continued possession of firearms and ammunition by persons under this disability is a violation of law and may subject the possessor to criminal penalties. In addition, such firearms and ammunition are subject to seizure and forfeiture.

In cases where your agency becomes aware of individuals subject to this disability, we recommend that such persons be encouraged to relinquish all firearms and ammunition in their possession immediately to a third party, such as their attorney, their local police agency, or a firearms dealer.

If such person refused to relinquish the firearm or ammunition, and your agency is without authority to retain or

seize the firearm or ammunition, you should contact the local ATF office.

Brady Act

In the so-called "Brady States" Chief Law Enforcement Officers (CLEOs) "shall make a reasonable effort" to determine whether a prospective buyer's receipt of a handgun would be in violation of the law. CLEOs have five business days in which to make that reasonable effort. What constitutes a "reasonable effort" is to be determined by each law enforcement agency based on its own circumstances, *e.g.*, the availability of resources, access to records, and the law enforcement priorities of the jurisdiction.

This "reasonable effort" standard is not altered by the addition of this new disqualifying category. It remains fully within the discretion of the CLEO to determine what effort is reasonable. For example, even if the CLEO determines that a misdemeanor assault conviction has occurred, it remains fully within the CLEO's discretion to determine whether to make further inquiry.

ATF forms are being revised to reflect the new category of prohibited persons.

If you have any questions concerning these new provisions, contact your local ATF office or the Firearms and Explosives Regulatory Division at 202-927-8300.

/s/ John W. Magaw
John W. Magaw
Director

QUESTIONS AND ANSWERS REGARDING MISDEMEANOR CRIME OF DOMESTIC VIOLENCE

Q. X was convicted of misdemeanor assault on October 10, 1996. The crime of assault does not make specific mention of domestic violence but the criminal complaint reflects that he assaulted his wife. May X still possess firearms and ammunition?

A. No. X may no longer possess firearms or ammunition.

Q. X was convicted of the same crime on September 20, 1996, 10 days before the effective date of the new statute. He possesses a firearm on October 10, 1996. May X lawfully possess firearms?

A. No. If a person was convicted of the crime at any time, he or she may not lawfully possess firearms or ammunition on or after September 30, 1996.

Q. Officer C was charged with felony assault on her child in 1989. She pled guilty to a misdemeanor and the felony charge was dismissed. She was suspended from the police force and ordered to undergo counseling. After successful completion of the counseling, she was reinstated. May Officer C lawfully possess firearms or ammunition?

A. No. Officer C. may no longer lawfully possess firearms or ammunition either on or off duty.

Note: For one who has been convicted of a misdemeanor crime of domestic violence, the prohibition on the possession of firearms and ammunition does not apply if the individual has received a pardon for the crime, the conviction has been expunged or set-aside, or the person has

had civil rights restored (if there was a loss of civil rights) AND the person is not otherwise prohibited from possession firearms or ammunition.